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In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MALLEABLE IRON RANGE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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MALLEABLE IRON RANGE COMPANY

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QUESTION PRESENTED

Whether the Board properly concluded that nonmanagerial "confidential employees" are entitled to the full protection of the National Labor Relations Act unless they assist and act in a confidential capacity to officials who formulate, effectuate, and determine labor-relations policies, or regularly have access to information concerning anticipated changes that may result from collective-bargaining negotiations.

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The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Seventh Circuit in these cases.[1]

OPINIONS BELOW

The opinion of the court of appeals in *Hendricks* (App. A, *infra*, 1a-13a) is reported at 627 F.2d 766. The supplemental decision and order of the National Labor Relations Board (App. C, *infra*, 16a-21a), on prior remand from the court of appeals, are reported at 247 N.L.R.B. No. 68. The opinion of the court of appeals remanding the case to the Board (App. D, *infra*, 22a-32a) is reported at 603 F.2d 25. The Board's original decision and order (App. E, *infra*, 33a-55a) are reported at 236 N.L.R.B. 1616.

The opinion of the court of appeals in *Malleable* (App. F, *infra*, 56a-60a), is not reported. The decision and order of the Board (App. H, *infra*, 62a-75a) are reported at 244 N.L.R.B. No. 64. The Regional Director's decision and direction of election in the underlying representation proceeding (App. I, *infra*, 76a-94a) are not reported.

JURISDICTION

The judgment of the court of appeals in *Hendricks* (App. B, *infra*, 14a-15a) and the judgment of the court of appeals in *Malleable* (App. G, *infra*, 61a) were entered on July 21, 1980. On October 8, 1980, Justice Stevens extended the time for filing the peti-

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[1] Because these cases were decided by the same court and involve the same question of law, a single petition has been filed under Rule 19.4 of the Rules of this Court.

tion for a writ of certiorari to and including November 18, 1980. On November 10, 1980, Justice Stevens further extended the time for filing the petition for a writ of certiorari to and including December 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the National Labor Relations Act, 29 U.S.C. 152, provides in relevant part:

When used in this subchapter—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or dis-

cipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

* * * * *

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), provides in relevant part:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such

purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit * * *.

STATEMENT

A. Hendricks

1. On May 9, 1977, the general manager of Hendricks County Rural Electric Membership Corporation discharged his secretary, Mary Weatherman, because she had signed a petition calling for the reinstatement of Lloyd Hadley, a close friend and fellow employee, who had lost an arm in the course of his employment.[2] Weatherman subsequently filed with the National Labor Relations Board an unfair labor practice charge, in which she alleged that the discharge violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). Hendricks defended against the charge by claiming, among other things, that Weatherman was not entitled to statutory protection because, as secretary to the general manager, she was a "confidential employee" excluded from the coverage of the Act. The administrative law judge who heard the evidence determined that Weatherman was an employee within the protection of the Act, and that she had been discharged because she had engaged in concerted activity protected by Section 7 of the Act, 29 U.S.C.

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[2] Hadley became disabled in February 1976. In March 1977, he sought reemployment with Hendricks, but his application was denied. Subsequently, Weatherman and 25 other employees signed a petition that was addressed to the company's board of directors and urged reconsideration of that decision. When Wallace Dillon, the general manager, learned that the petition had been signed by Weatherman, an employee of nine years' standing, she was immediately discharged (App. E, *infra*, 38a-43a).

157. The Board affirmed the decision of the administrative law judge and ordered Weatherman's reinstatement. Applying the "labor nexus" test enunciated in *B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956), the Board found that Weatherman was not a "confidential employee" for purposes of the Act because she did not "assist and act in a confidential capacity to [a] person[] who formulate[s], determine[s], and effectuate[s] management policies in the field of labor relations" (App. E, *infra*, 33a-35a, 43a-49a; emphasis in original).[3]

The court of appeals sustained the Board's findings that Weatherman had been discharged for engaging in protected activity, and that she was not a "confidential employee" under the "labor nexus" standard that the Board had "historically" applied (App. D, *infra*, 24a-25a, 27a, 30a).[4] On the basis of this Court's deci-

[3] Although "confidential employees" are not excluded from protection under the definition of "employee" contained in Section 2(3) of the Act, 29 U.S.C. 152(3), the Board, for policy reasons, has long excluded such employees from bargaining units covering other employees, but only if they meet the Board's "labor nexus" test. See pages 15-18, 20-21, *infra*. The Board has held, however, that even "confidential employees" who meet the "labor nexus" test are protected, as Section 2(3) employees, against retaliatory discharges and other coercive conduct directed at their involvement in activities protected by Section 7 of the Act, 29 U.S.C. 157. See *Southern Greyhound Lines, Div. of Greyhound Lines, Inc.*, 169 N.L.R.B. 627 & n.2 (1968), enforced, 426 F.2d 1299, 1301 (5th Cir. 1970). But see *NLRB* v. *Wheeling Electric Power Co.*, 444 F.2d 783 (4th Cir. 1971). Accordingly, the Board held alternatively (App. E, *infra*, 44a) that Weatherman was entitled to statutory protection against retaliatory discharge even if she were a "confidential employee" meeting the "labor nexus" test.

[4] The court of appeals also sustained the Board's finding that Hendricks had violated Section 8(a)(1) of the Act, 29

sion in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), however, the court of appeals held that "*all* secretaries working in a confidential capacity, without regard to labor relations, [must] be excluded from the Act" (App. D, *infra*, 31a; emphasis in original). The court held that the Board's application of the "labor nexus" test was therefore an "error of law" and remanded the case to the Board to determine whether, " 'by the nature of [her] duties[,]' " Weatherman was " 'given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer' " (App. D, *infra*, 27a-31a).[5]

2. On remand, the Board accepted the standard enunciated by the court of appeals as "the law of this case only" (App. C, *infra*, 18a-19a).[6] Applying that standard, the Board again determined that Weatherman was not a "confidential secretary," and it reaffirmed its original order. The Board stated (App. C, *infra*, 20a):

U.S.C. 158(a)(1), by coercively interrogating another employee concerning the protected concerted activities (App. D, *infra*, 24a n.1; App. E, *infra*, 52a-53a).

[5] Judge Bonsal, sitting by designation, dissented on the need for a remand, stating that he would enforce the Board's order because the record satisfied him "that Mary Weatherman was not a 'confidential secretary' and was covered by the Act" (App. D, *infra*, 32a).

[6] That the remand was accepted does not now preclude the Board from seeking review of the legal principle governing the remand. See *Mercer* v. *Theriot*, 377 U.S. 152, 153-154 (1963); *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-258 (1916). See also *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

> [F]or Weatherman to qualify as a confidential employee under the standard erected by the court, the record would have to disclose that she performed confidential duties in connection with nonlabor relations or personnel areas. Quite clearly, however, the evidence taken at the hearing contains no hint that Weatherman had any such responsibilities.[7] That this was not merely an oversight in the course of litigation is confirmed by [General Manager] Dillon's statement that [Hendricks] simply did not have secret papers or documents.

By divided vote, the court of appeals denied enforcement (App. A, *infra*, 6a-8a). The Court reaffirmed its earlier holding that this Court's decision in *Bell Aerospace* required the rejection of the Board's traditional "labor nexus" test and compelled

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[7] Specifically, the Board found that Weatherman was responsible, as secretary to the general manager, for answering his telephone, typing his correspondence, and opening that portion of his mail that was not first removed by the office manager. With respect to the letters that Weatherman typed, the Board found no evidence to show that they concerned confidential matters of any description. With respect to her mail duties, the Board noted that certain significant incoming mail, such as correspondence from Hendricks' attorneys concerning labor negotiations, was removed by the office manager and given directly to the general manager, without having crossed Weatherman's desk. Weatherman placed a few of the general manager's telephone calls, but she did not keep account of his appointments. Weatherman did not attend meetings of management or the board of directors and, although she was responsible for typing the minutes of the directors' meetings, the Board found that these documents did not contain confidential information because the general manager conceded that Hendricks kept no secret papers or documents (App. C, *infra*, 19a-20a).

the conclusion that all "confidential employees" are excluded from the Act. While acknowledging (App. A, *infra*, 3a-4a) that this Court in *Bell Aerospace* held only that "all employees properly classified as 'managerial,' rather than just those in positions susceptible to conflicts of interest in labor relations" are excluded from the Act, the court of appeals noted that the Court, in reaching this conclusion, had relied at least in part upon the premise "that 'confidential employees' were excluded from coverage under a 'broad definition' not limited to those having a labor nexus." The court of appeals then held that the Board's finding, that Weatherman was not a "confidential employee" under the court's prior decision, was not supported by substantial evidence on the record as a whole. The court noted (App. A, *infra*, 8a) that the Board, in reaching its conclusion, had relied upon the general manager's statement at the hearing that Hendricks "simply did not have secret papers or documents." Giving a narrower construction to the evidence, however, the court found (*ibid.*; emphasis by court) that the general manager had stated only that the cooperative "had 'nothing to hide from its *members*.'" The court concluded (*ibid.*):

> That a company has no secrets from its members does not mean that it does not have matters or documents which are confidential insofar as its non-confidential employees are concerned, insofar as its competitors are concerned, insofar as regulatory agencies are concerned, and insofar as the public is concerned.

Judge Cudahy dissented. He noted at the outset that, in light of the court's prior decision in this case, the exclusion of "a confidential *secretary* * * * from

the protection of the Labor Act (whether or not the confidences are labor relations-related) * * * is, for better or for worse, the present law of this Circuit" (App. A, *infra*, 9a; emphasis in original; footnote omitted). At the same time, he found "abundant evidence in the record to support the Board's conclusion that Weatherman is not properly classified as a confidential secretary" (App. A, *infra*, 9a-10a).[8] Moreover, Judge Cudahy noted that there was no authority to support the majority's broader holding that all " 'confidential employees' (not limited to secretaries and, of course, not limited by the labor relations' nexus) are unprotected under the Act" (App. A, *infra*, 10a-11a). Finally, he stated (App. A, *infra*, 12a-13a; emphasis in original; footnotes omitted):

> To paint with a broad brush about the purported exclusion of "confidential employees" (other than those having the well-accepted "labor nexus") from the protection of the Act may be to strike a major blow at white collar unionism. Many, *if not most*, white collar workers are involved in something which may be argued to be "confidential" in some general sense. There are matters of credit, of costs, of designs, of customer lists, of prices, of medical records—the list is

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[8] Judge Cudahy observed (App. A, *infra*, 10a; emphasis in original):

> [Hendricks'] strongest (or at least most fully developed) argument to the contrary seems to be that Weatherman was responsible for processing employees' medical and disability insurance claims—admittedly confidential. But these were the confidences of *employees* she had to keep. It is simply ludicrous that one should be classified as part of "management" and lose the protections conferred on "labor" because one is entrusted with the confidences of one's fellow workers.

endless. I do not perceive at all that the dicta of *Bell Aerospace* point down this road.

B. Malleable

On December 18, 1978, Local 39, Office and Professional Employees Union, AFL-CIO, filed a representation petition seeking certification as the bargaining agent for a residual unit of office clerical, technical, and professional personnel employed by Malleable Iron Range Company at its Beaver Dam, Wisconsin, facility (App. F, *infra*, 56a-57a). At the representation hearing that was subsequently held, Malleable claimed, *inter alia*, that 18 of the approximately 64 residual employees were excluded from the Act by reason of their access to allegedly confidential—albeit not labor-related—business information.[9]

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[9] Specifically, Malleable contended that the following employees should be denied the protection of the Act: (a) three draftsmen who have access to product development information that is not available to other persons; (b) four technical service-engineers who have access to confidential information concerning manufacturing costs, product performance test results, and patentable product development information, all of which is not generally available to employees or the public; (c) a salesman who has access to customer lists; (d) three distribution-traffic-product service manager assistants who have access to credit data considered confidential as to competitors, confidential information pertaining to potential product liability matters, and confidential distributor and dealership lists; (e) the advertising manager, who has access to confidential customer and distributor lists; (f) the assistant cost department manager, who is privy to confidential cost and price information, including the company's profit percentages; (g) the assistant computer service manager, who has access to financial reports, such as sales-cost analyses, which are confidential and not generally available to

Applying the Board's "labor nexus" test, the Regional Director found that these employees were properly included in the bargaining unit because none of them worked "in a confidential capacity for a person involved in the formulation, determination and effectuation of the Employer's labor relations policies" (App. I, *infra*, 82a, 84a, 85a, 89a, 90a). The Union prevailed in the election by a vote of 40 to 15, and it was certified by the Board (App. H, *infra*, 65a, 68a). Malleable refused to bargain, however, and contested the validity of the certification. The Union subsequently filed charges with the Board, which found that the refusal to bargain had violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158 (a)(1) and (5), and the Board issued a bargaining order (App. H, *infra*, 68a-70a).

By divided vote, the court of appeals denied enforcement, stating that (App. F, *infra*, 58a):

> [Malleable] has contended that at least 18 of its employees should be excluded from the unit because they have access to confidential information and are therefore confidential employees. The Board conceded that in determining the employees included in the unit it applied "the Board's traditional 'labor nexus' test" and not the test or standard established in *Hendricks*.

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employees or the public; (h) the assistant credit department manager who has access to accounts receivable information; (i) a computer operator who has access to management-type financial reports such as sales-cost analysis reports; (j) the assistant bookkeeper, who has access to confidential information concerning accounts payable and cash receipts; and (k) the secretary to the company's industrial sales manager, who has access to confidential information concerning costs and anticipated price increases (Ct. App. Br. 21, 28, 27-28, 31-42).

Accordingly, the court remanded the case to the Board for reconsideration under *Hendricks* (App. F, *infra*, 59a).[10]

REASONS FOR GRANTING THE PETITION

For at least 40 years, the Board has ruled that only those "confidential employees" who have access to confidential information relating to labor-relations matters should be accorded less than the full protection of the National Labor Relations Act. By contrast, the holdings of the court of appeals in these two cases would exclude from the coverage of the Act all employees who " 'by the nature of [their] duties [are] * * * given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer' " (App. D, *infra*, 31a). The broad exclusionary rule articulated by the court of appeals is contrary to principles that have long been applied by the Board and approved by the courts of appeals, and its application will materially affect the Board's administration of the Act by excluding countless white-collar and other employees who have previously been protected. The decisions of the court below have created a conflict among the circuits concerning an important question of federal law that warrants review by this Court.

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[10] Judge Cudahy dissented from the remand order with respect to 17 of the 18 employees whose coverage was at issue (App. F, *infra*, 60a). He conceded, however, that a remand "might be needed" under the court's first decision in *Hendricks* with respect to the secretary to the company's industrial sales manager, the "[o]nly one of the challenged employees [who] is a secretary" (*ibid.*).

1. The court of appeals held that its broad formulation of the exclusionary rule was compelled by this Court's decision in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974). Prior to *Bell Aerospace*, the courts of appeals had uniformly upheld the Board's position that only those "confidential employees" with access to confidential labor-related information should be accorded a special status under the Act. See, *e.g.*, *Service Technology Corp.*, 196 N.L.R.B. 1036, 1040-1041, 1043 (1972), enforced, 480 F.2d 923 (5th Cir. 1973) (table), cert. denied, 415 U.S. 948 (1974); *Westinghouse Electric Corp.* v. *NLRB*, 398 F.2d 669, 670 (6th Cir. 1968); *NLRB* v. *Quaker City Life Insurance Co.*, 319 F.2d 690, 692, 694 (4th Cir. 1963); *NLRB* v. *Armour & Co.*, 154 F.2d 570, 573-574 (10th Cir. 1945), cert. denied, 329 U.S. 732 (1946); *NLRB* v. *Poultrymen's Service*, 138 F.2d 204, 210-211 (3d Cir. 1943).

Moreover, while the Seventh Circuit found that its rejection of the Board's "labor nexus" test was compelled by this Court's decision in *Bell Aerospace*, no other court of appeals has so held in the six years since that decision. In *Union Oil of California, Inc.* v. *NLRB*, 607 F.2d 852, 853-854 (1979), for instance, the Ninth Circuit upheld the Board's determination that three computer operators, who were responsible for computer entry and extraction of confidential business information, were not "confidential employees" for purposes of the Act. In approving the Board's "labor nexus" test, the court noted that the Board's narrow definition of "confidential employee" was reasonable "[b]ecause most employees have an arguably confidential relationship with management, and because an expansive application of the exclusionary rule would deprive many employees of the right to bargain collectively" (*id.* at 853). Similarly,

in *NLRB* v. *Allied Products Corp.*, 548 F.2d 644, 648 (1977), the Sixth Circuit held that the Board had properly "declined to treat secretaries as confidential unless the managers for whom they work are sufficiently engaged in labor-maangement negotiations to warrant exclusion of their secretaries from the benefits of collective bargaining representation." [11] Accord, *NLRB* v. *Hoerner-Waldorf Corp.*, 525 F.2d 805, 807-808 (8th Cir. 1975) (enforcing bargaining order for a unit including two employees found not to be "confidential employees" under the "labor nexus" standard).

In these circumstances, the Seventh Circuit's rejection of the Board's "labor nexus" test for determining the status of "confidential employees" under the National Labor Relations Act clearly warrants review.

2. Unlike the broad exclusionary rule articulated by the court below, the Board's "labor nexus" test accords with the overall policy and legislative history of the National Labor Relations Act.

a. The statutory definition of "employee" does not purport to exclude "confidential employees" from the coverage of the Act. See Section 2(3) of the Act, 29 U.S.C. 152(3). Shortly after the Act became law, however, the Board determined as a matter of statutory policy that employees with access to confidential labor-related information should be excluded from bargaining units comprised of employees who did not

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[11] The court disagreed with the Board's application of the standard to the facts presented, however, and held that the two secretaries involved had a sufficient "labor nexus" to require their exclusion from the bargaining unit (*id.* at 648-650).

have access to such information. See, *e.g.*, *Creamery Package Manufacturing Co.*, 34 N.L.R.B. 108, 110 (1941) (excluding stenographer who took dictation concerning labor problems at plant); *Paramount Pictures, Inc.*, 45 N.L.R.B. 116, 122-123 (1942) (excluding payroll auditors with access to personnel records). In *Hoover Co.*, 55 N.L.R.B. 1321, 1323 (1944) (footnote omitted), the Board explained:

> [I]n negotiating and in the settlement of grievances, the interests of a union and the management are ordinarily adverse. Consequently, we have adhered to the opinion that the management should not be required to handle labor relations matters through employees who are represented by the union with which the Company is required to deal and who in the normal performance of their duties may obtain advance information of the Company's position with regard to contract negotiations, the disposition of grievances, or other labor relations matters.[12]

Accord, *Brooklyn Daily Eagle*, 13 N.L.R.B. 974, 986 (1939).

The narrow scope of this exclusionary rule was underscored by the Board's consistent refusal to exclude from bargaining units employees with access to non-labor-related confidential business information, on the ground that "the possession of important information is of itself insufficient to justify exclusion from the right to collective bargaining." *Creamery Package Manufacturing Co.*, *supra*,

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[12] The Board there found inappropriate even a separate unit of employees with access to confidential labor-related information because the union seeking to represent them also represented the employer's production and maintenance complement. Accord, *Electric Boat Co.*, 57 N.L.R.B. 1348, 1349 (1944).

34 N.L.R.B. at 111.[13] The Tenth Circuit correctly explained the rationale for the Board's rule in 1945 when it noted, in sustaining the certification of a unit of plant clerks who collected and tabulated confidential business data, that the clerks could properly be required to treat such information as confidential, but that "exclusion from the Act is not the price of honest and faithful service." *NLRB* v. *Armour & Co.*, 154 F.2d 570, 574 (10th Cir. 1945), cert. denied, 329 U.S. 732 (1946), enforcing 54 N.L.R.B. 1005 (1944). Accord, *Armour & Co.*, 49 N.L.R.B. 688, 690-691 (1943); *Credit Bureau of Greater Boston, Inc.*, 73 N.L.R.B. 410, 412-413 (1947).

In 1946, the Board stated the "labor nexus" test in somewhat narrower terms. In *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946), the Board determined that the exclusion of all employees with *mere access* to confidential labor-related matters was "too inclusive and needlessly precludes many employees from bargaining collectively together with other workers

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[13] The Board thus refused to exclude from bargaining units various employees who had access to non-labor-related confidential information. See, *e.g.*, *Bull Dog Electric Products Co.*, 22 N.L.R.B. 1043, 1046 (1940) (draftsmen and engineers with access to "confidential matters"); *Creamery Package Manufacturing Co., supra*, 34 N.L.R.B. at 110-111 (blueprint machine operator with access to confidential documents); *Poultrymen's Service Corp.*, 41 N.L.R.B. 444, 447-448 (1942), enforced, 138 F.2d 204 (3d Cir. 1943) (office employees with access to "important" business information); *General Motors Corp., Chevrolet Motor Div.*, 58 N.L.R.B. 1096, 1102 (1943) (clerk trainees with access to machinery production schedules, cost records, and trade secrets); *Bell Aircraft Corp.*, 56 N.L.R.B. 1356, 1359 (1944) (laboratory employees performing "secret" work on war products); and *American Smelting and Refining Co.*, 61 N.L.R.B. 506, 508 (1945) (bookkeeper with access to all financial records of employer).

having common interests." Finding appropriate a bargaining unit composed of time-study employees, the Board thus limited the exclusionary rule to "only those employees who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations." Accord, *St. Louis Independent Packing Co.*, 67 N.L.R.B. 543, 547-549 (1946); *Brown & Sharp Mfg. Co.*, 68 N.L.R.B. 487, 489 & n.3 (1946).

b. In 1947, the House passed legislation that would have excluded from the Act a broad class of supervisory employees, as well as time-study personnel, plant guards, persons working in labor-relations and personnel departments, and confidential employees. H.R. 3020, 80th Cong., 1st Sess. § 2(12) (1947).[14] Moreover, the House bill defined "confidential employee" as "any individual * * * who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer." H.R. 3020, *supra*, § 2(12)(C). The House recognized that its bill contained an exclusionary rule more expansive than that which the Board then ap-

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[14] At that time, the Board's practice was to treat supervisors, time-study personnel, plant guards, and confidential employees as persons protected by the Act. See, *e.g.*, *Packard Motor Car Co.*, 61 N.L.R.B. 4, 64 N.L.R.B. 1212 (1945), aff'd, 330 U.S. 485 (1947) (supervisory foremen); *Ford Motor Co.*, 66 N.L.R.B. 1317, 1321-1322 (1946) (time-study personnel); *Yellow Truck and Coach Manufacturing Co.*, 39 N.L.R.B. 14, 17-18 (1942) (plant protection employees); *Bethlehem Steel Co.*, 63 N.L.R.B. 1230, 1232 (1945) (confidential employees).

plied. H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947).

The Senate, on the other hand, passed legislation that rejected the House's broad definition of "supervisor" and contained no exclusion for time-study personnel, plant guards, individuals working in labor-relations and personnel departments, or confidential employees of any description. S. 1126, 80th Cong., 1st Sess. § 2(11) (1947). Indeed, the Senate bill expressly included "professional employees" within the coverage of the Act, thereby encompassing many individuals who necessarily would have been excluded under the House definition of "confidential employees." S. 1126, *supra*, § 2(12).[16]

In conference, the Senate's view prevailed, and professional employees were specifically accorded the protection of the Act. See H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947). Moreover, the conferees accepted the Senate's narrower definition of "supervisor" and declined to include the House bill's specific exclusion of persons working in labor-relations and personnel departments, time-study personnel, guards, and confidential employees. The report stated (*id.* at 35):

> The conference agreement, in the definition of "supervisor," limits such term to those individuals treated as supervisors under the Senate

[16] The Senate report expressed the view that the organizational rights of architects, chemists, engineers, lawyers, and scientists should be protected, and that such employees should be allowed to form separate bargaining units. S. Rep. No. 105, 80th Cong., 1st Sess. 11, 19 (1947). It was recognized that such individuals invariably handle confidential information that is not available to the public, to competitors, or to employees generally. See 93 Cong. Rec. 3733, 3739 (1947) (Rep. Jackson).

> amendment. In the case of persons working in labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. * * *

c. The Board continued after the enactment of the 1947 amendments to exclude from bargaining units of other employees only those confidential employees with a "labor nexus." In *Art Metal Construction Co.*, 75 N.L.R.B. 80, 83-84 (1947), for instance, the Board excluded an employee who typed confidential labor relations reports, but refused to exclude a second employee, whose work concerned only non-labor-related confidential business information.[16] The Board has since continued to exclude from bargaining units only those employees with access to confidential information who "assist and act in a confidential capacity to persons who formulate, determine, *and* effectuate management policies in the field of labor relations" (*B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956) (emphasis in original)), or who "regularly have access to information concerning anticipated changes which may result from collective-bargaining

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[16] See also *Chrysler Corp.*, 76 N.L.R.B., 50, 53 (1948) (declining to exclude office employees with access to confidential business and financial records); *Sargent & Co.*, 95 N.L.R.B. 1515, 1518 & n.11 (1951) (declining to exclude research mechanic with access to trade secrets).

negotiations." *American Radiator & Standard Sanitary Corp.*, 119 N.L.R.B. 1715, 1720 (1958).[17] Accord, *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 N.L.R.B. No. 54 (Nov. 21, 1980).

In sum, the decisions below are inconsistent with the legislative and administrative history of the Act.

3. The court of appeals erred in holding that rejection of the Board's "labor nexus" test was required by this Court's decision in *Bell Aerospace*. In *Bell Aerospace*, the Court rejected the Board's view that only those "managerial" employees[18] susceptible to conflicts of interest in labor-relations matters should be excluded from the Act, holding that all truly "managerial" employees are excluded (416 U.S. at 274, 289). First, the Court noted that the Board had, until 1970, consistently excluded all "managerial" employees from bargaining units composed of other employees (*id.* at 275-277, 285-288). Second, the Court found that the Act's essential distinction between management and labor could not be maintained without the exclusion of all managerials (*id.* at 282, 284-285 & n.13). Finally, the Court noted that the legislative history of the 1947 amendments showed that Congress believed that certain categories of employ-

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[17] Compare *American Lithofold Corp.*, 107 N.L.R.B. 1061, 1064-1065 (1954) (excluding bookkeepers who are informed of possible wage increases for purposes of setting aside necessary funds), with *American Radiator, supra*, 119 N.L.R.B. at 1720 (including personnel clerk who compiles statistical data, but has no knowledge of labor policies which may result therefrom).

[18] Managerial employees are employees who " 'formulate and effectuate management policies by expressing and making operative the decisions of their employer' " (416 U.S. at 288).

ees, including certain confidential employees, were so clearly beyond the protection of the Act that no specific exclusionary provision was deemed necessary. The Court inferred that " 'managerial employees' were paramount among this impliedly excluded group" (*id.* at 283-284).

The Seventh Circuit, in reaching the conclusion that *Bell Aerospace* mandates the exclusion from coverage of all "confidential employees," relied on this Court's observation (416 U.S. at 283-284 & n. 12) that the 1947 Conference Committee indicated its intention to adopt the House bill's broad exclusion for confidential employees by reporting (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 35 (1947)) that "it was not the intention of the conferees to alter * * * in any respect" the Board's "prevailing practice" of treating "such people as confidential secretaries" as "outside the scope of the Act." As we have shown (pages 18-20, *supra*), however, the conferees specifically rejected the House bill's broad exclusion, and followed the Senate version by including various groups of professional employees who would by definition have routine access to confidential information.[19] Moreover, the conferees noted their approval of the "prevailing Board practice," and that practice—which had been consistently followed for at least eight years prior to 1947—merely accorded a special status to confidential employees meeting the "labor nexus" test,

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[19] It would make no sense to include within the coverage of the Act a research chemist having access to trade secrets, while excluding his "confidential" secretary or clerk. That result would not further the public policy of the Act, and it is one that should not be embraced without clear evidence that Congress so intended.

and excluded such employees only from membership in bargaining units composed of other employees.[20]

Moreover, the Act's fundamental distinction between workers and management—the principal public policy justification for excluding from coverage all truly "managerial" employees—does not require the same result with respect to all "confidential employees." As the Court noted in *Bell Aerospace*, "managerial" employees have "abandoned the 'collective security' of the rank and file because they believe the opportunities thus opened to them to be more valuable to them than such 'security' " (416 U.S. at 281 n.11, quoting H.R. Rep. No. 245, *supra*, at 16-17). As defined by the court below, however, "confidential employees" are manifestly "workers" rather than "bosses." There is no basis for asserting that "confidential employees" have chosen to "abandon[] the collective security of the rank and file voluntarily." Such persons have become "confidential employees" only because their employers have chosen, for their own purposes, to have them handle, often in an essentially ministerial fashion, certain information that the employers would prefer not to have disseminated

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[20] The Board has otherwise treated such employees as protected under the Act. See, *e.g.*, *Southern Colorado Power Co.*, 13 N.L.R.B. 669, 710 (1939), enforced, 111 F.2d 539 (10th Cir. 1940); *Coopersville Cooperative Elevator Co.*, 77 N.L.R.B. 1083, 1084-1085 & n.6 (1948); *American Book-Stratford Press, Inc.*, 80 N.L.R.B. 914, 915 (1948); *Southern Greyhound Lines, Div. of Greyhound Lines, Inc.*, 169 N.L.R.B. 627 & n.2 (1968), enforced, 426 F.2d 1299, 1301 (5th Cir. 1970); *Service Technology Corp.*, 196 N.L.R.B. 1036, 1043 (1972), enforced, 480 F.2d 923 (5th Cir. 1973) (table); *Peavey Co.*, 249 N.L.R.B. No. 110, slip op. 2-3 n.3 (May 27, 1980). But see *NLRB* v. *Wheeling Electric Power Co.*, 444 F.2d 783 (4th Cir. 1971).

widely. The Board has thus properly concluded that "confidential employees" are entitled to the full protection of the Act unless they have access to labor relations information which, if it were revealed, would give their bargaining representative an unfair advantage in dealing with their employer.

4. The Seventh Circuit's exclusionary rule, which excludes all employees with access to business information that the employer would keep confidential insofar as other employees, competitors, regulatory agencies and the public are concerned (App. A, *infra*, 8a), would exclude countless employees who have previously been entitled to the protection of the Act. While Judge Cudahy correctly noted in dissent that the majority's decision "strike[s] a major blow at white collar unionism" (App. A, *infra*, 12a), the effect of these decisions is more far-reaching than that. The rationale of the decisions below would also exclude from the protection of the Act many blue collar workers who may receive information in the course of their employment concerning such matters as manufacturing and assembly processes, which their employer would otherwise keep confidential. Clearly, the decisions below warrant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1980

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-1283

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review and Cross-Application for Enforcement of Order of the National Labor Relations Board

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ARGUED JUNE 3, 1980—DECIDED JULY 21, 1980

Before SPRECHER and CUDAHY, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

SPRECHER, *Circuit Judge.* This review causes us to examine again the questions (1) what standard is to be applied to determine a confidential employee excluded under the National Labor Relations Act, 29

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

U.S.C. §§ 151 *et seq.*, and (2) whether the Board's finding that an employee was not a confidential employee is supported by substantial evidence on the record considered as a whole. See 29 U.S.C. § 160(e).

I

On July 17, 1978, the Board issued its order finding that the Company had violated section 8(a)(1) of the Act by discharging Mary M. Weatherman, the personal secrtary to its general manager and chief executive officer, for signing a petition calling for the reinstatement of an injured employee, and by interrogating another employee regarding the petition. The Board ordered the Company to cease and desist from discharging or taking other adverse action against any employee for engaging in protected, concerted activity, and from coercively interrogating employees concerning such activity. The Board further ordered the Company to reinstate Weatherman to her former job, or a substantially equivalent position, with back pay. 236 N.L.R.B. 1616 (1978).

On July 26, 1979, this court enforced the Board's order concerning the 8(a)(1) interrogation. However, we reversed and remanded the portion of the order dealing with the discharge of Weatherman and ordered the Board to use the legal standard outlined in our opinion to determine whether she was a confidential employee and therefore not covered by the Act. 603 F.2d 25 (7th Cir. 1979).

On October 10, 1979, the Board advised the parties that it had "decided to accept the remand from the Court of Appeals . . . , and all parties are hereby advised that they may file Statements of Position with the Board . . . ." The Company in its statement indicated that it believed that the record already con-

tained enough evidence to require the conclusion that Weatherman was not an employee under the standard established by this court. The Company added:

> However, if the Board believes that its prior conclusions and testimony hereinbelow does [*sic*] not mandate such a conclusion, the . . . [Company] believes that it is entitled to and that the Board should order a reopening of the proceedings to present further evidence regarding the issues on remand.

Record, Statement of Position of Hendricks County Rural Electric Membership Corporation, at 3.

Instead of taking further evidence, the Board reexamined the previous record and reaffirmed its prior conclusion that Weatherman was an employee under the Act. 247 N.L.R.B. No. 68 (1980).

The case is again before the court upon the Company's petition for review and the Board's cross-application for enforcement.

II

In *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), the Supreme Court held that Congress intended to exclude from the protection of the National Labor Relations Act all employees properly classified as "'managerial,' rather than just those in positions susceptible to conflicts of interest in labor relations." *Id.* at 274. To reach this holding, the Court first concluded that "confidential employees" were excluded from coverage under a "broad definition" not limited to those having a labor nexus. The Court said:

> In 1946 in *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322, the Board had narrowed its definition of "confidential employees" to embrace only those

> who exercised "'managerial' functions in the field of labor relations." The discussion of "confidential employees" in both the House and Conference Committee Reports, however, unmistakably refers to that term as defined in the House bill, which was not limited just to those in "labor relations." Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.

416 U.S. at 284 n.12.

Immediately following in the text, the Court quoted with complete approval the Court of Appeals statement in *Bell Aerospace* as follows:

> "Surely Congress could not have supposed that, while confidential secretaries could not be organized, their bosses could be."

Id. at 284, quoting 475 F.2d 485, 491-92 (2d Cir. 1973).

Thus, although the *Bell Aerospace* holding applied to managerial employees, the statement in note 12 about confidential employees was not a mere dictum,[1] but was the basis, or at least part of the basis, upon which the holding itself was constructed. In *United States* v. *Bukowski*, 435 F.2d 1094, 1101 (7th Cir. 1970), we noted that a court of appeals could not depart, at its own choosing, from an analytical construct uniformly adhered to in decisions of the Supreme Court.

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[1] A dictum in a Supreme Court opinion may be brushed aside by the Supreme Court as dictum when the exact question is later presented, but it cannot be treated lightly by inferior federal courts until disavowed by the Supreme Court. See 1B Moore's Federal Practice ¶ 0.402, at p. 112 & n.8.

Although the Board has accepted our prior decision in this case, in at least one subsequent case pending on review before us, *Malleable Iron Range Co.* v. *N.L.R.B.*, No. 79-1991, the Board strongly urges that our prior decision be overruled,[2] either on the basis that the Supreme Court was in error or misled as to the legislative history in footnote 12, or because of the Court's later opinion in *N.L.R.B.* v. *Yeshiva University*, 100 S.Ct. 856 (1980).

Not only are decisions of the Supreme Court of the United States and their clear implications absolutely binding on inferior federal courts,[3] but this is especially true of matters of legislative history and congressional purpose, *In re Continental Investment Corp.*, 586 F.2d 241, 248 (1st Cir. 1978), and of standards to be applied by an administrative agency or lower court. *Patterson* v. *Brown*, 393 F.2d 733, 736 (10th Cir. 1968). While we seriously doubt that the Supreme Court could be misled by counsel, a court of appeals is not at liberty to go behind an opinion or its clear implications on the ground that the Supreme Court "was not fully apprised by counsel in that case as to the legislative history . . . ." *United States* v. *Russell*, 461 F.2d 605, 608 (10th Cir. 1972).

We find nothing in the *Yeshiva* case which undermines or impliedly overrules anything said in *Bell*

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[2] However, this decision is the law of this circuit unless and until this court sitting in banc would determine otherwise or unless higher authority makes a contrary determination. *Powell* v. *United States*, 338 F.2d 556, 557 (7th Cir. 1964).

[3] The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const., Art. III, § 1.

Aerospace, which is cited with approval throughout the opinion. Therefore, we adhere to everything we said in *Hendricks County Rural Electric Membership Corp.* v. *N.L.R.B.*, 603 F.2d 25 (7th Cir. 1979), despite the Board's opinion that it is erroneous insofar as it relies upon note 12 of *Bell Aerospace*. Any changes in the substance of note 12 must come from higher authority.

III

In our prior opinion, we concluded that:

> The administrative law judge in this case limited his factual inquiry to a determination that Weatherman had not acted in a confidential capacity with respect to labor relations. We therefore find it necessary to remand the case for a determination [under the proper standard] . . . .

603 F.2d at 30 [footnote omitted].

The administrative law judge in his original opinion made it clear that the only standard he applied and the only one that the record evidence supported was the labor nexus standard:

> The record shows that Weatherman did not act "in a confidential capacity" to Dillion [the general manager] in any meaningful sense with respect to . . . [the Company's] labor relations policies . . . .
>
> * * * *
>
> Weatherman's "duties do not involve her in a confidential capacity with his responsibilities" with respect to labor policies. Accordingly, I conclude that Weatherman was not a confidential employee as the Board defines that term.

236 N.L.R.B. at 1619, 1620.

The record context in which the above statements were made by the administrative law judge was as follows. Early in the proceedings, the Company filed a written motion to dismiss on the ground that Weatherman was a confidential employee excluded under the Act. In an order dated July 22, 1977, an administrative law judge other than the one who eventually heard the evidence ruled that the motion would be reserved for the judge who would conduct the hearing. When the hearing began before the second judge, he noted the pendency of the motion and reserved his ruling. Near the beginning of the general manager's testimony intended to establish the confidential nature of Weatherman's job, the administrative law judge admonished the general manager to "stick to personnel files" and "to files pertaining to the employees." Transcript, Vol. II, at 101. A reading of the administrative record makes it obvious that the admonitions were observed inasmuch as there is clearly a conscious effort by all participants to restrict the evidence to that which pertains to labor or personnel matters.

If we had believed that the prior record was sufficient to support a finding under the *Bell Aerospace* standard, we would not have remanded the proceeding to the Board. Upon remand, the Board asked for statements of position, and the Company's position was that the proceedings should be reopened to present further evidence. When an erroneous standard for the admission of evidence is used, it follows almost mandatorily that a new record is needed, not only to add evidence in patchwork fashion but also possibly to rehear all the relevant evidence under the different admission standard.

The Board did not reopen the proceedings under the different standard, did not take any additional

evidence, did not remand the proceedings to the administrative law judge who heard the original evidence, and has sent us the same record we reviewed before. We are asked to enforce an order which purports to apply the new standard to the old record but actually reapplies the old standard incorporating the labor nexus.[4]

The new broad standard was found to apply to the old record on the basis of "Dillon's statement that the . . . [Company] simply did not have secret papers or documents." Memo. op. at 5. Dillon's statement was that the Company had "nothing to hide from the *members*," Transcript, Vol. II, at 115 [emphasis supplied], and was supposedly supported by the Board's gratuitous conclusion that the Company "is a cooperative, and that all members *presumably* have access to [its] documents . . . ." Memo. op. at 4 n.8 [emphasis supplied]. That a company has no secrets from its members does not mean that it does not have matters or documents which are confidential insofar as its non-confidential employees are concerned, insofar as its competitors are concerned, insofar as regulatory agencies are concerned, and insofar as the public is concerned.

The petition to review is granted, and the application to enforce the order is denied.

ENFORCEMENT DENIED

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[4] The order is larded with labor nexus language: (1) "[A]mong the mail she did not see was that regarding union relations"; (2) "this correspondence apparently did not relate to labor relations or personnel matters"; (3) "[w]hile these meetings [of the Board of Directors] apparently occasionally involved personnel matters"; (4) "Weatherman did not type internal memoranda regarding labor relations or personnel or employment matters."

CUDAHY, *Circuit Judge*, dissenting.

Unfortunately, the majority analysis here leads to a quite unjustifiable outcome. The result is that Mary Weatherman, personal secretary to the general manager of a rural electric membership corporation, has been lawfully fired for signing a petition asking for the reinstatement in his job of a friend and fellow worker who lost his arm in the course of his employment. Whatever may be our discomfiture at the Board's maneuvers on remand, only the gravest of reasons should lead us to sanction such a lamentable injustice.

While it might have been more politic for the Board to have reopened the hearing, the Company argues only one specific fact which it would have tried to establish during such a reopening: the Company's "involve[ment]" in "three (3) litigation cases" (presumably with a competitive investor-owned utility). There is slight likelihood that this "new fact" would materially change the basis for evaluating Weatherman's status as a "confidential secretary." The fact is that Weatherman's status was well explored and ventilated at the original hearing, and both we and the Board should be able to reach the requisite conclusion based on that record.

Hendricks County Rural Electric Membership Corp. v. *N.L.R.B.*, 603 F.2d 25 (7th Cir. 1979) ("*Hendricks I*") does indeed hold that a confidential *secretary* is excluded from the protection of the Labor Act (whether or not the confidences are labor relations-related). *Hendricks I* is , for better or for worse, the present law of this Circuit.[1] But there is abundant evidence in the record to support the Board's con-

[1] *But see Union Oil Company of California* v. *N.L.R.B.*, 607 F.2d 852 (9th Cir. 1979), which reaffirmed the traditional

clusion that Weatherman is not properly classified as a confidential secretary.

The Company's strongest (or at least most fully developed) argument to the contrary seems to be that Weatherman was responsible for processing employees' medical and disability insurance claims—admittedly confidential. But these were the confidences of *employees* she had to keep. It is simply ludicrous that one should be classified as part of "management" and lose the protections conferred on "labor" because one is entrusted with the confidences of one's fellow workers.

On a broader issue, the majority seems to assert that *Hendricks I* holds that "confidential *employees*" (not limited to secretaries and, of course, not limited by the labor relations' nexus) are unprotected under the Act. With the most profound deference, I find the holding of *Hendricks I* to be more narrowly directed specifically to *secretaries*. That case teaches that:

> The legislative history of the Taft-Hartley Act, as interpreted in *Bell Aerospace*, requires the conclusion that *all* secretaries working in a confidential capacity, without regard to labor relations, be excluded from the Act. 603 F.2d at 30.

This conclusion of our Court may be consonant with the dicta of *Bell Aerospace*,[2] which found, quoting the Second Circuit that, "surely Congress could not have

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Board standard under *The B. F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956), that the employee, to be excluded, must assist in a confidential capacity *with respect to labor relations*. *Accord*, *N.L.R.B.* v. *Allied Products Co., Richard Bros. Div.*, 548 F.2d 644 (6th Cir. 1977).

[2] *N.L.R.B.* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974).

supposed that, while "confidential secretaries could not be organized, their bosses could be." 410 U.S. at 234 (quoting 475 F.2d at 491-92). If there is anything relating to confidential *employees* "upon which the holding [in *Bell Aerospace*] itself was constructed" (as the majority here perceives the issue), it is most evidently the relationship of confidential *secretaries* to their "managerial" bosses.

Everything else—beyond confidential secretaries—that relates to "confidential employees" is at the farther reaches of dictum, both in *Bell Aerospace* and in *Hendricks I*. Nothing about confidential employees generally is found in the holding in either case, nor is the status of such employees generally, a part of the essential framework from which the respective holdings emerge.

The majority admonishes us of the need for deference to the dicta of the Supreme Court. I have no quarrel with this as far as it goes, but the fact remains that the broad dicta in footnote 12 of *Bell Aerospace* about "confidential employees" are ambiguous[3] and essential to nothing. There are dicta and there are dicta, and the rule of *stare decisis* must give them effect appropriate to the circumstances under which they appear.[4] To build a whole new

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[3] Thus footnote 12 contains the following quotation from a House Report: *"Most of the people who would qualify as 'confidential' employees are executives and are excluded from the Act in any event.*

The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these." Does this suggest that lower-level employees, not clerks or secretaries to executives, are rarely to be excluded?

[4] The Supreme Court long ago stated:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection

body of law about "confidential employees" uninvolved in labor relations, on the footnote dicta of *Bell Aerospace*—all in the name of deference to the Supreme Court—is quite simply totally unwarranted.[5] To paint with a broad brush about the purported exclusion of "confidential employees" (other than those having the well-accepted "labor nexus") from the protection of the Act may be to strike a major blow at white collar unionism. Many, *if not most*, white collar workers are involved in something which may be argued to be "confidential" in some general sense. There are matters of credit, of costs, of designs, of customer lists, of prices, of medical records—the list is endless.[6] I do not perceive at all

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with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

[5] In *Hendricks I* this court said in commenting on *Bell Aerospace*, "Nor do we think that the policies favoring the exclusion of all managerial employees from the Act necessarily dictate the exclusion of all confidential secretaries as well." 603 F.2d at 29.

[6] "Because most employees have an arguably confidential relationship with management, and because an expansive application of the exclusionary rule would deprive many employees of the right to bargain collectively, the Board has narrowly construed the definition of confidential employee." *Union Oil Company of California* v. *N.L.R.B.*, *supra*, n.1 at 853.

that the dicta of *Bell Aerospace* point down this road. Nor does *Hendricks I* require such a journey.

With the utmost respect, I dissent.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Opinion by Judge Sprecher
Judge Cudahy dissenting

NLRB JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 80-1283

Before
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge *

July 21, 1980

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review and cross-Application for Enforcement of an Order of the National Labor Relations Board

This cause came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that enforcement of the order

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

of the National Labor Relations Board reviewed in this matter be, and the same is hereby, DENIED, with costs, in accordance with the opinion of this court entered this date.

A True Copy:

Teste:

/s/ Kathy Davis
Deputy Clerk of the U.S. Court of Appeals for the Seventh Circuit

APPENDIX C

FPT
D—6002
Danville, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 25—CA—8921

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

and

MARY M. WEATHERMAN, an Individual

SUPPLEMENTAL DECISION AND ORDER

On July 17, 1978, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that the Respondent had violated Section 8(a)(1) of the National Labor Relations Act, as amended, by discharging Mary M. Weatherman, personal secretary to its general manager, for signing a petition calling for the reinstatement of an injured employee, and by interrogating another employee regarding the petition. The Board ordered the Respondent to cease and desist from discharging or taking other adverse action against any employee for engaging in protected, concerted activity, and from coercively interrogating employees concerning such activity. The Board further ordered the Respondent to reinstate Weatherman to her former job or, should that job no longer exist, to a substantially equivalent position, and to make her

[1] 236 NLRB No. 212.

whole for any loss of earnings she may have suffered by reason of her discharge.

Thereafter, the Respondent filed a petition for review of the Board's Order in the United States Court of Appeals for the Seventh Circuit, and the Board filed a cross-application for enforcement of its Order. On July 26, 1979, the court issued its decision,[2] which enforced the Board's Order concerning the 8(a)(1) interrogation, but reversed and remanded the aspect of the case dealing with the discharge of Weatherman to determine whether she was a confidential employee and therefore not covered by the Act under a different standard than that used by the Board.

On October 10, 1979, the Board advised the parties that it had decided to accept the remand, and that they might submit statements of position with respect to the issue raised by the remand. Thereafter, the General Counsel and the Respondent filed statements of position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The issue on remand is narrowly limited to the alleged confidential status of Weatherman, as the court concluded that the Board's finding that she was discharged for participating in protected, concerted activity—signing a petition requesting the reinstatement of an injured employee—was supported by the evidence.

In our original decision, we found that Weatherman was not a confidential employee measured

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[2] *Hendricks County Rural Electric Membership Corporation* v. *N.L.R.B.*, 603 F.2d 25.

against our traditional standard that such employees are "persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." [3] And the court agreed with our factual determination that, as personal secretary to Wallace Dillon, the Respondent's general manager, Weatherman did not act and assist him in a confidential capacity with respect to labor relations policies. The court also agreed with our finding that she did not work in a position equivalent to a personnel department employee. However, the court concluded, in light of its interpretation of the Supreme Court's opinion in *N.L.R.B.* v. *Bell Aerospace Company, Division of Textron, Inc.*,[4] that *B. F. Goodrich* does not enunciate the correct legal standard for judging confidential employee status under the Act. Rather, the court held that the proper criteria to be applied is whether, by the nature of the employee's duties, the employee is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer. Accordingly, recognizing that "[t]he determination of 'confidential' status is . . . a question appropriately committed to Board discretion," the court remanded the case to us to decide under this standard if Weatherman was a confidential employee in terms of her "actual job responsibilities, authority, and relationship to management." [5] Accepting the court's criteria for resolving questions of confidential employee status

[3] *The B. F. Goodrich Company*, 115 NLRB 722, 724 (1956).

[4] 416 U.S. 267 (1974).

[5] 603 F.2d at 30.

as the law of this case only, we find that Weatherman was not a confidential employee.

When she was discharged in May 1977, Weatherman had been personal secretary to Dillon, the Respondent's general manager and top executive officer, for a little more than 4 years. In this capacity, she answered the telephone and opened mail addressed to the Respondent and Dillon, except for some mail which was removed before it reached her by Office Manager Donald Douglas and given to Dillon by him.[6] Although Weatherman typed all of Dillon's letters, this correspondence apparently did not relate to labor relations or personnel matters other than occasional letters referring to the dates of negotiating meetings with a union. Nor is there any evidence that it concerned confidential matters of any description. Weatherman generally did not place Dillon's telephone calls, nor did she keep a record of his appointments. Weatherman did share a partitioned office with Dillon, but no personnel records or confidential records of any type were kept there, excluding Dillon's testimony that he kept some papers concerning labor negotiations in a file behind his desk.[7] Weatherman did not attend meetings of Respondent's board of directors or other management meetings. However, she did type minutes of meetings of the board

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[6] Among the mail she did not see was that regarding union relations.

[7] As we pointed out in the initial decision herein, Weatherman had no duties concerning labor negotiations, nor was there any evidence that she was even aware of the existence of Dillon's file.

Weatherman did maintain some files respecting routine insurance claims filed by employees, which she was responsible for processing, for her own convenience.

of directors and the agenda for such meetings. While these meetings apparently occasionally involved personnel matters, there is no indication that such matters, or any other issues discussed during them, were confidential.[8] Weatherman did not type internal memoranda regarding labor relations or personnel or employment matters. Finally, and most significantly, Dillon conceded at the hearing that the Respondent did not maintain secret or classified papers or documents.

As previously noted, the court of appeals affirmed not only our earlier finding that Weatherman did not work in a confidential capacity in respect to labor relations matters, but also that she was not the equivalent of a personnel department employee. Thus, for Weatherman to qualify as a confidential employee under the standard erected by the court, the record would have to disclose that she performed confidential duties in connection with nonlabor relations or personnel areas. Quite clearly, however, the evidence taken at the hearing contains no hint that Weatherman had any such responsibilities. That this was not merely an oversight in the course of litigation is confirmed by Dillon's statement that the Respondent simply did not have secret papers or documents.

Therefore, we reaffirm our conclusion, made in the original decision in this case, that the Respondent discharged Weatherman in violation of Section 8(a)(1) of the Act, and our remedial Order concerning that violation.[9]

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[8] We noted in our original decision that the Respondent is a cooperative, and that all members presumably have access to documents such as the minutes of board meetings.

[9] It is unnecessary to reaffirm our previous Order in regard to the Respondent's violation of Sec. 8(a)(1) by coercively

ORDER

It is hereby ordered that the Order issued by the Board in *Hendricks County Rural Electric Membership Corporation*, 236 NLRB No. 212 (1978), concerning the discharge of Mary M. Weatherman in violation of Section 8(a)(1) of the Act be, and it hereby is, reaffirmed.

Dated, Washington, D.C. January 22, 1980

JOHN H. FANNING, Chairman

JOHN A. PENELLO, Member

JOHN C. TRUESDALE, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

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interrogating an employee, inasmuch as the court has already enforced that portion of our Order.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 78-2127

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

A Petition for Review of an Order from the National Labor Relations Board

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ARGUED APRIL 13, 1979—DECIDED JULY 26, 1979

Before CUMMINGS, SPRECHER, *Circuit Judges*, and BONSAL, *Senior District Judge.**

SPRECHER, *Circuit Judge.* The employer, Hendricks County Rural Electric Memebership Corporation (REMC), appeals from a decision of the National Labor Relations Board finding that REMC engaged in unfair labor practices in violation of sec-

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* The Honorable Dudley B. Bonsal, Senior District Judge of the Southern District of New York, is sitting by designation.

tion 8(a)(1) of the National Labor Relations Act. 29 U.S.C. § 158(a)(1). The principal issue presented by this appeal is whether the personal secretary to the general manager of REMC was an "employee" under section 2(3) of the Act. 29 U.S.C. § 152(3). We hold that the Board did not apply the appropriate legal standard for resolving this issue and remand for a factual application of the proper standard.

I

On May 9, 1977, the general manager of REMC, Wallace Dillon, discharged his personal secretary, Mary Weatherman. The General Counsel charged that Weatherman was discharged for engaging in concerted activities protected by section 7 of the National Labor Relations Act. The administrative law judge conducted a hearing and determined that Weatherman was an "employee" within the coverage of the Act, that she had engaged in protected concerted activity and that Dillon discharged her for that activity. The judge ordered REMC to reinstate Weatherman with back pay.

The facts surrounding Weatherman's discharge were carefully established by the administrative law judge. Lloyd Hadley, a close friend of Weatherman, was injured in the course of employment in February 1976, resulting in the loss of an arm. In March 1977, Hadley sought reinstatement with REMC. The Board of Directors notified Hadley in April that he would not be reinstated.

The first week in May, a petition requesting reconsideration of the decision not to reinstate Hadley was mailed to members of the Board. The petition was signed by 26 employees. Mary Weatherman signed the petition; she was the sixth employee to do so. On

Saturday, May 7, one of the directors called Dillon at home to advise him of the petition. Dillon drove to the director's home that day in order to see the petition.

At 10:00 a.m. on Monday, May 9, Dillon discharged Weatherman. At the hearing, Dillon testified that he discharged Weatherman for conduct unrelated to the Hadley petition. The administrative law judge conducted an extensive and careful evaluation of the evidence and concluded that Dillon's explanation of the discharge was "ludicrous."

We conclude, contrary to the argument of the employer, that the judge's decision that Mary Weatherman was discharged for signing the Hadley petition is fully supported by the evidence.[1] REMC argues additionally that the circulation of the Hadley petition was not conduct protected by the Act and that Mary Weatherman was not an employee protected by the Act. Although we conclude that the judge correctly characterized Mary Weatherman's conduct as "protected," we find it necessary to remand the decision for a new determination of her "employee" status.

II

REMC was guilty of an unfair labor practice in this case only if Mary Weatherman was discharged for engaging in "concerted activities for the purpose of . . . mutual aid or protection." Section 7, 29 U.S.C. § 157. The circulation of the petition among the employees was undoubtedly "concerted," but

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[1] The ALJ also found that REMC violated the Act by improperly interrogating another clerical employee about the petition. We find this conclusion is also supported by the evidence.

REMC disputes that it was circulated for the "purpose of mutual aid or protection."

The Board has only recently reiterated that circulation of a petition on behalf of a discharged employee is protected activity under section 7. *Youngstown Osteopathic Hospital Association*, 224 N.L.R.B. 574 (1976). Such activity is protected even if the discharge of the employee was lawful. *See, e.g., NLRB* v. *Pepsi-Cola Bottling Co.*, 449 F.2d 824, 830 n.5 (5th Cir. 1971).

Employee conduct should similarly be protected when the petition criticizes the employer's refusal to reinstate an injured employee. The administrative law judge specifically found the petition was motivated in part by the employees' desire to promote their own future well being should they be faced with a similar misfortune. Refusal to reinstate a former company employee seriously injured on the job is an issue about which the REMC employees "had a legitimate interest . . . in making known their views to management without being discharged for that interest." *NLRB* v. *Phoenix Mutual Life Ins. Co.*, 167 F.2d 983, 988 (7th Cir. 1948).[3]

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[3] *Allied Chemical & Alkali Workers, Local No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), strongly relied on by the employer, simply does not undermine this conclusion. In *Pittsburgh Plate Glass*, the Court refused to find that reduction of the retired employees' pensions was a mandatory subject of bargaining. Mandatory bargaining extends only to the " 'terms and conditions of employment' of the employer's 'employees' . . . ." 404 U.S. at 164. The scope of activity protected under section 7 is obviously much broader, extending to concerted activity engaged in for the purposes of mutual aid and protection. Thus the fact that REMC may not have been under an obligation to bargain with the employees over Hadley's reinstatement in no way limits the employees' freedom to circulate a petition on his behalf.

III

Although the ALJ properly concluded that the circulation of the petition was protected activity, that protection can only extend to an individual who is an "employee" under the Act. Despite the breadth of the definition of "employee," [3] the Supreme Court has established that certain categories of employees are impliedly excluded from that definition. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974). REMC argues that individuals working in personnel departments or as confidential secretaries are impliedly excluded and that Weatherman fits in both categories.

In determining whether Mary Weatherman was a statutory "employee," the ALJ applied a well-established Board standard. The judge ruled that Mary Weatherman was only excluded from the Act if she "assist[ed] and act[ed] in a confidential capacity to persons who formulate, determine, and effectuate

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[3] The Act provides:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

§ 2(3), 29 U.S.C. § 152(3).

management policies in the field of labor relations." 236 N.L.R.B. No. 212 Appendix at 7, *quoting B. F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956). Examining the evidence carefully, the judge determined that Weatherman "did not act 'in a confidential capacity' to Dillon in any meaningful sense with respect to [employer's] labor relations policies. . . ." *Id.* The ALJ also found that Weatherman was not working in a position equivalent to a personnel department employee, a finding which we do not consider clearly erroneous. The judge therefore concluded that Weatherman was a statutory "employee."

We do not believe that the judge erred factually by finding that Weatherman did not assist in a confidential capacity with respect to labor relations policies. We do conclude, however, that the use of the *B. F. Goodrich* standard was an error of law.

This Court has previously held that "confidential" secretaries are excluded from the Act. *Peerless, Inc.* v. *NLRB*, 484 F.2d 1108 (7th Cir. 1973). *See also NLRB* v. *Wheeling Electric Co.*, 444 F.2d 783 (4th Cir. 1971). The *B. F. Goodrich* standard does represent current Board law on the question of whether a secretary should be considered an excluded "confidential secretary." *See Willett Motor Coach Co.*, 227 N.L.R.B. 882 (1977); *Minneapolis Star and Tribune Co.*, 222 N.L.R.B. 342, 343 (1976); *California Inspection Rating Bureau*, 215 N.L.R.B. 780, 783 (1974). Nonetheless, we believe that standard was exposed to serious question by the 1974 decision of the Supreme Court in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974).

In *Bell Aerospace*, the Supreme Court confronted the issue of whether buyers in an employer's purchasing department were statutory employees or were ex-

cludable as managerial employees. The Board argued that even though the buyers were managerial, they were covered by the Act since their jobs were unrelated to the "formulation and implementation of labor relations policies." 416 U.S. at 272. The Supreme Court disagreed, holding that all managerial employees were excluded from the Act without regard to any employment nexus to labor relations policies.

The Supreme Court was not presented with the issue of whether all secretaries acting in confidential capacity are also excluded from the Act without regard to labor relations nexus. Nor do we think that the policies favoring the exclusion of all managerial employees from the Act necessarily dictate the exclusion of all confidential secretaries as well. Nonetheless, the Supreme Court interpretation in *Bell Aerospace* of the 1947 amendment to the National Labor Relations Act and its legislative history requires the conclusion that all confidential secretaries are excluded.

In 1947, Congress passed the Taft-Hartley Act, amending the National Labor Relations Act to exclude "supervisors" from the Act.[4] The House bill, H.R. 3020, 80th Cong., 1st Sess. (1947), excluded,

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[4] The Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

§ 2(11), 29 U.S.C. § 152(11).

through its definition of supervisor, those employees "employed in labor relations, personnel, [or] employment . . . matters" as well as those "who by the nature of [their] duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of employer." 416 U.S. at 279-80 n.9. The Senate Bill, on the other hand, did not enumerate these two categories of employees for exclusion.

Although the Senate version of the Bill was eventually enacted, the Conference Committee Report emphasized that "persons working in labor relations, personnel and employment departments" and "confidential secretaries" were considered excluded. A specific provision "was not thought necessary . . . since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the Act." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35-36 (1947). Relying on this legislative history, the Supreme Court in *Bell Aerospace* concluded that confidential employees, including confidential secretaries, were persons "who both the House and the Senate believed were plainly outside the Act." 416 U.S. at 283.

Proceeding from the interpretation that confidential secretaries were excluded from the Act, the Court reasoned that managerial employees should also be impliedly excluded. The Court concluded: "The Court of Appeals in the instant case put the issue well: '. . . Surely Congress could not have supposed that, while 'confidential secretaries' could not be organized, their bosses could be.' " *Id.* at 284, quoting 475 F.2d at 491-92.

The Court thus clearly read the 1947 history as indicating a Congressional intention to exclude con-

fidential secretaries. The Court's opinion and various segments of the legislative history further clarify that "confidential" status was not to be defined by reference to labor relations. The Court stated, "[t]he discussion of 'confidential employees' in both the House and Conference Committee Reports . . . unmistakably refers to that term as defined in the House bill, which was not limited just to those [employees] in 'labor relations.'" 416 U.S. at 284 n.12. The House Report, in no uncertain terms, expressed an intention that "confidential" status not be restricted by a labor nexus.

> [P]rotecting confidential financial information from competitors and speculators, protecting secret processes and experiments from competitors, and protecting other vital secrets ought not to rest in the administrative discretion of the board . . . . The bill therefore excludes from the definition of employees persons holding positions of trust and confidence whose duties give them secret information.

H.R. Rep. No. 245, 80th Cong., 1st Sess., as cited in *NLRB* v. *North Arkansas Electric Cooperative, Inc.*, 446 F.2d 602, 606 (8th Cir. 1971).

The conference report, as excerpted above, states that no specific exception was necessary since the Board already excluded such individuals. In fact, the Board has historically excluded only those confidential secretaries working for individuals in the field of labor relations. *See, e.g., Consolidated Vultee Aircraft Corporation*, 54 N.L.R.B. 103, 113 (1943). Nonetheless, the Supreme Court found that although "Congress may have misconstrued . . . Board practice," it "clearly thought that the Act did not cover

'confidential employees' even under a broad definition of that term.' " 416 U.S. at 268 n.12.[5]

The legislative history of the Taft-Hartley Act, as interpreted in *Bell Aerospace*, requires the conclusion that *all* secretaries working in a confidential capacity, without regard to labor relations, be excluded from the Act. The administrative law judge in this case limited his factual inquiry to a determination that Weatherman had not acted in a confidential capacity with respect to labor relations. We therefore find it necessary to remand the case[6] for a determination of whether "by the nature of [her] duties" she was "given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer." H.R. 3020 § 2 (12) (C), 80th Cong., 1st Sess. (1947). See also 416 U.S. at 284 n.12. The determination of "confidential" status is of course a question appropriately committed to Board discretion. As the Supreme Court stated in *Bell Aerospace*, "the specific job title of the employees involved is not in itself controlling. Rather, the question whether particular employees are 'managerial' [or confidential] must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management." 416 U.S. at 290 n.19. The order is reversed and remanded for proceedings consistent with this opinion.

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[5] See also note 10 of the Second Circuit opinion in *Bell*. 475 F.2d 485, 492.

[6] As to the necessity for remand in a case such as this, *see Bell Aerospace*, 416 U.S. at 290; *FTC* v. *Sperry & Hutcherson Co.*, 405 U.S. 233, 249 (1972).

BONSAL, *District Judge*, dissenting.

I would affirm. The record satisfies me that Mary Weatherman was not a "confidential secretary" and was covered by the Act. The finding of the administrative judge that she was discharged for engaging in protected concerted activity, viz., the circulation of the petition asking reconsideration by the Board of Directors of its decision not to reinstate Hadley, was supported by substantial evidence.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX E

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION *and* MARY M. WEATHERMAN

Case 25-CA-8921

July 17, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

On April 4, 1978, Administrative Law Judge Bernard Reis issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in support of the Decision of the Administrative Law Judge.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] The Respondent has also filed a motion entitled "Motion to Strike General Counsel's Brief to the Board." In its motion, the Respondent characterizes the General Counsel's brief as an answering brief and asserts that it does not comply with Sec. 102.46(d)(1) and (2) of the Board's Rules and Regulations, Series 8, as amended, which govern the filing of answering briefs. The General Counsel's brief, however, is clearly denominated as a brief in support of the Decision of the Administrative Law Judge. We note that Sec. 102.46(a) of the Rules and Regulations sets forth the provisions regarding the filing of such briefs and, upon careful examination, we have determined that the General Counsel's brief complies with the pertinent portion of that section in all respects. Accordingly, the Respondent's motion to strike is denied.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, to modify his remedy,[2] and to adopt his recommended Order.

In agreement with the Administrative Law Judge, we find that the Respondent's discharge of Mary Weatherman in violation of Section 8(a)(1) of the Act necessitates an order requiring the Respondent to cease and desist from infringing in any other manner upon the rights guaranteed employees by Section 7 of the Act. In our view, the Respondent's action in discharging Weatherman for engaging in protected concerted activity strikes at the heart of the rights intended to be protected by the Act. See *N.L.R.B.* v. *Entwistle Mfg. Co.*,[3] and *Electrical Fittings Corporation, a subsidiary of ITE Imperial Corporation.*[4] We specifically note the Respondent's rapid retaliation shortly after being made aware of Weatherman's participation in protected activity and the blatantly pretextual reasons given for her discharge. We further note that the Respondent coercively interrogated Martha Sellers who, like Weatherman, was one of the Respondent's 10 unrepresented clerical employees,[5] regarding the identity of the employee chiefly responsible for the circulation of the petition herein. Accordingly, we view the above-stated facts as establishing the Respondent's intention to thwart the basic

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[2] *See Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), for rationale on interest payments.

[3] 120 F.2d 532, 536 (C.A. 4, 1941).

[4] 216 NLRB 1076 (1975).

[5] The Respondent's entire employee complement is comprised of approximately 35 employees.

purposes of the Act, and therefore conclude that a broad order is justified under the circumstances present in this case.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Hendricks County Rural Electric Membership Corporation, Danville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.[6]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a hearing at which all parties had the opportunity to present their evidence, it has been decided that we violated the law and we have been ordered to post this notice. We intend to carry out the Order of the Board and abide by the following:

The Act gives all employees these rights:

To engage in self-organization
To form, join, or help unions

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[6] The Administrative Law Judge inadvertently failed to conform the notice with his recommended Order. We shall correct the notice accordingly.

To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other mutual aid or protection

To refrain from any and all of these things.

WE WILL NOT discharge or otherwise discipline any employee for engaging in concerted activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT coercively interrogate employees about such activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL offer to Mary M. Weatherman immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent one, without prejudice to her seniority or other rights, privileges, or working conditions.

WE WILL make Mary M. Weatherman whole, plus interest, for any loss of pay or other benefits suffered by her as a result of her discharge.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

DECISION

BERNARD RIES, Administrative Law Judge: This matter was heard on December 22, 1977, and January 9, 1978, in Indianapolis, Indiana. The complaint,

denied in all material respects, alleges that the Respondent, Hendricks County Rural Electric Membership Corporation, violated Section 8(a)(1) of the National Labor Relations Act, as amended, by discharging Mary M. Weatherman on May 9, 1977, and by coercively interrogating another employee 2 weeks thereafter. I find the complaint supported by the evidence.

The parties have submitted briefs. On the basis of the demeanor of the witnesses, the entire record,[1] and the arguments advanced on brief, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

Respondent is engaged, at Danville, Indiana, in the business of supplying electricity and related services. During the year preceding issuance of the complaint, it purchased and received in Indiana goods valued in excess of $50,000 from other States, and sold electricity at a value in excess of $500,000. Upon the factual concessions made in Respondent's answer to the complaint, I find that Respondent is an employer engaged in commerce within the meaning of the Act.

II. THE RELEVANT EVIDENCE

Respondent is a rural electric membership cooperative. While fundamental policies are established by a 10-man board of directors, its top executive officer is General Manager Wallace E. Dillon, who has occupied that position for 14 years. The basic issue presented is whether, on May 9, 1977, Dillon discharged

[1] Errors in the transcript have been noted and corrected.

Mary Weatherman, his secretary, because of her participation in concerted activities protected by Section 7 of the statute. At the time of her discharge, Weatherman had been employed by Respondent for more than 9 years, and had served as Dillon's secretary for 4 years.

Lloyd Hadley, a longtime employee of Respondent and a close friend of Weatherman's, was injured in the course of employment in February 1976, suffering the loss of an arm. Hadley recovered sufficiently so that, in March 1977, he sought reinstatement with Respondent. In April, the board of directors notified Hadley that he would not be considered for reinstatement to active employment.

Toward the end of April, a petition, addressed to the board of directors, circulated among Respondent's employees. The petition praised Hadley's outstanding past service to Respondent, stressed his surprising recuperation, spoke of his intense desire to return to work, and asked that the board reconsider its decision. The petition was signed by 26 employees, including both "outside" workers and office clerical employees.[2] Mary Weatherman signed the petition; she was the sixth employee to do so.

Copies of the petition were mailed to members of the board in the first week of May. At 3 p.m. on Saturday, May 7, Director Truax called General Manager Dillon at home, ascertained that Dillon had not seen the petition, and asked Dillon to come to Truax's house so that he might see Truax's copy. Dillon drove some 7 miles to do so.

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[2] The outside employees, about 25 in number, are represented by the International Brotherhood of Electrical Workers; the 10 clericals are not represented by a labor organization.

At 10 a.m. on Monday, May 9, Dillon discharged Weatherman. The reason given her for the termination and, as Dillon testified at the hearing, the only reason for the action, was that she had lied to him in the preceding week. The date of the incident relied on by Dillon as the sole reason for discharge is in dispute: Dillon testified that it occurred on Friday, May 6, but Weatherman said it was Thursday, May 5. The basic facts of the incident, however, are not in controversy.

In March, Dillon had received from Respondent's group retirement administrator two forms relating to Lloyd Hadley's disability claim, one a form to be filled out by Hadley, and the other to be completed by Hadley's physician. The forms were needed to establish Hadley's disability so that a waiver of premiums for his life insurance could be obtained. As of the first week in May, Hadley's form was virtually completed, except, apparently, for Hadley's signature, but Dillon was awaiting return of the other document by the physician. Dillon intended to return both forms to the retirement administrator at the same time.

On May 5 or 6, Dillon, who was in his office perusing a file folder which contained xeroxed copies of the Hadley form, asked Weatherman about her personal knowledge of Hadley's intentions ("if he was going to draw his long-term disability or what he was going to do about it"), and also inquired about the location of the original forms. Weatherman stated that the doctor had not returned his. Looking at the copy of Hadley's form, and noting the absence of any notation that the original had been mailed out, Weatherman asked Dillon if the original was in the file. When he said it was not, she said she must have

mailed it to a firm named J. F. Molloy and Associates, which administers Respondent's group medical insurance program.[3]

A while later, Dillon again inquired about the form, and Weatherman repeated that she must have sent it to Molloy. Several minutes later, Dillon inquired once more, received the same answer, and then asked her to call Molloy and tell them, if they had the form, to forward it to Respondent's broker. When Weatherman called and was told by Molloy that it had not received the form, she looked in her file on Hadley, which she thought Dillon had already done, and found the missing document.[4] She informed Dillon of the discovery and asked if he wanted it mailed to the broker; he said not to send it until the doctor's form had been received, at which time both could be sent together.[5]

On Monday, May 9, at or about 10 a.m., the first working day after he saw the petition with Weatherman's name on it, Dillon called Weatherman into his office and told her that because she had "fibbed" to him the previous week about having mailed out the form, she was discharged.

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[3] Weatherman testified that it was the practice to mail any forms with the designation "Bankers Life Company" on them (as the Hadley form had) to Molloy.

[4] Weatherman had not checked her files before because she had assumed that the file Dillon was looking at was her own. The record shows that Dillon maintained his own separate file on the Hadley case, and I assume that was in fact the file which Weatherman saw open before him.

[5] The foregoing findings are based on the testimony of Weatherman, a much more impressive witness than Dillon There is, however, not a great deal of conflict between their accounts.

At the threshold, I find that the disputed incident occurred on Thursday, May 5, rather than the following day. Weatherman testified that, after the solution of the missing form mystery, Dillon told her to tell Hadley to come in to see him the next time Hadley visited the office. The next day, May 6, Hadley dropped in, Weatherman conveyed the message, and Hadley apparently met with Dillon. Hadley, a credible witness, corroborated Weatherman's testimony.[6]

I further find that the sole reason for the discharge of Weatherman was the fact that she had signed the Hadley petition.

Dillon's claim that he discharged her for "fibbing" to him is preposterous. The facts surrounding the temporarily missing document, discussed above, make it plain that any sane person (which Dillon is) would have regarded Weatherman's failure to immediately locate the form as a simple error, not a deception. Asked at the hearing if he could conceive of any reason why Weatherman would want to lie about having sent the form to Molloy, Dillon could think of none. Dillon, who testified that he delayed firing Weatherman in order to spend the weekend considering the matter, unquestionably would have recognized, in so deliberating, that any "lie" about having sent the letter to Molloy would have been pointless, since, even if Weatherman had done so, it would have been the simplest matter to retrieve the form from Molloy, a

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[6] Respondent introduced, for purposes of impeachment, a note written by Weatherman on May 18 to a former business associate in which she discussed the circumstances of her discharge. In doing so, she stated in the first paragraph that Dillon had asked about the status of the form on "May 6th." In the second paragraph, however, Weatherman wrote, "This was on Thursday." The reference to May 6 was, as Weatherman testified, an obvious inadvertence.

local concern. In addition, since Respondent had, to Dillon's knowledge, retained a copy of the form, there was no possibility of loss.

I find too ludicrous for serious consideration the claim that Dillon, who purportedly debated the potential discharge at some length, finally concluded that this minor mistake should be characterized as a lie and the basis for discharging an employee with 9 years' tenure. The incredulity expressed by Weatherman in her final conversation with Dillon was apt: "Are you telling me that you are terminating me because of an insurance form that I said I had mailed and it hadn't been mailed but we didn't want it mailed anyway, and he said that's right."

Further support for the conclusion of pretext is found in Dillon's wholly inept attempt to explain the delay in firing Weatherman for the reason asserted. Since, had the incident actually occurred on Thursday, he could not have easily justified more than a 1-day delay, until Friday, for the asserted purpose of thinking the matter over, he shifted the date of the occurence to Friday, thus hoping to lend some plausibility to an otherwise surprising discharge at the beginning of the week.

But he did more. He added, as a reason for waiting until Monday, instead of having immediately punished Weatherman for the offense which allegedly occurred on Friday, that he had held back because he did not want to discharge her until he received the form from Hadley's doctor: "Over the weekend I had determined that when the form came in and I had it in my hand, then I was going to terminate her." Upon inquiry, he could furnish no explanation for this strange precondition. What he appeared to be saying was that it was critically important that Weatherman, and only Weatherman, be there to per-

sonally open the letter containing the doctor's form, or to write a letter asking for it, and yet he had no explanation why her presence was indispensable to such mundane tasks. There were nine other clericals in the office and Dillon was in good health; any of them, I feel certain, was up to the job of opening an envelope. This nonsensical explanation for delay further depreciates the value of Dillon's perilously frail reason for discharge.

I conclude, therefore, with no reservations, that the appearance of Weatherman's signature on the petition, seen by Dillon on Saturday, caused him to reach back to the preceding Thursday and magnify into a dischargeable offense the trivial incident which had occurred on that day.[7] Respondent, however, ad-

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[7] I have taken into account Weatherman's open testimony that, on Thursday, she had the "impression" that Dillon thought she "had intentionally held the form back for some reason," although "he didn't say that." How much of that impression is hindsight unconsciously influenced by the reason given to her for the discharge and by Dillon's testimony is unascertainable. But even if it were true that Dillon evinced such an attitude, I find, in view of the delay, the fact that no rational mind, after considering the matter, could have concluded that she had been intentionally lying, the deception about when the incident occurred, and the fatuous story about retaining Weatherman until the doctor's letter was received, that the precipitating cause for discharge of this 9-year employee was Dillon's interim awareness of the petition.

That Dillon would have been particularly upset about Weatherman's participation (and that of other employees) in the petition sent to the directors is, I note, demonstrated by her uncontradicted testimony that, in February 1977, when she had contacted some directors about certain innocuous travel plans, Dillon angrily warned her, "I never again want you to call the directors."

In reaching my conclusion about Dillon's motive, I have considered the testimony of Assistant Manager Wayne Spen-

vances two legal defenses to the claimed violation here. The first is that Weatherman was confidential employee and therefore not protected by the Act.

In *Wheeling Electric Company*, 182 NLRB 218, 220-221 (1970), the Board held that confidential employees are entitled to the safeguards afforded by Section 8(a)(1). That decision was reversed on review, 444 F.2d 783 (C.A. 4, 1971). Subsequently, although without reference to *Wheeling*, the Board approved the conclusion of a Trial Examiner that "there can be no inference that [confidential employees] are not accorded the protection of the Act from unfair labor practices." *Peerless of America, Incorporated*, 198 NLRB 982, 987 (1972). Finding persuasive the Fourth Circuit's *Wheeling* opinion, the Seventh Circuit denied enforcement of *Peerless* on this point. 484 F.2d 1108, 1112 (1973).

It would appear that *Wheeling* and *Peerless* represent the Board's last say on the issue, and I am therefore bound to reject the defense. In any event, my evaluation of the evidence leads me to conclude that the defense has no sufficient factual predicate.

The Board defines confidential employees as "persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *The B. F. Goodrich Company*, 115 NLRB 722, 724 (1956). There are thus two essential elements. The first is that the employee assist "in a confidential capacity." The second is that the person assisted ful-

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cer, who testified that Dillon displayed no "irritation" when he told Spencer, around May 10, about the petition, and that Dillon later said to Spencer that Weatherman had been terminated because she "storied to him about a letter." Spencer's testimony does not alter some rather plain facts.

fill all three roles *vis-a-vis* labor relations policies; in *B. F. Goodrich*, the Board stressed the word "and" between "determine" and "effectuate," and in *Weyerhaeuser Company*, 173 NLRB 1170, 1172 (1968), it reiterated that "the quoted considerations are to be assessed in the conjunctive." [8]

The record shows that Weatherman did not act "in a confidential capacity" to Dillon any meaningful sense with respect to Respondent's labor relations policies; it discloses, in fact, that the range of her duties was deliberately restricted so as to preclude her from doing so. By and large, Weatherman's duties related to the routine operations of Respondent's business. While she opened mail addressed to Respondent and Dillon, she credibly testified that she never saw copies of correspondence from Respondent's lawyers to the union which represented the outside workers, because Office Manager Donald Douglas removed all such mail before it reached her desk and gave it directly to Dillon. Weatherman further credibly testified that Dillon normally placed his own telephone calls, and that she did not keep a list of Dillon's appointments.[9]

There were no personnel files maintained in the partitioned office shared by Weatherman and Dillon. As she testified, and Dillon substantially agreed, the only files she maintained were for those employees who made insurance claims; Weatherman kept these files for her own convenience, to use in processing the claims, and they were apparently destroyed after a short period of time.

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[8] This approach, however, seems vulnerable to attack. It is hard to conceive that, if the assisted person only "formulates" policy, his confidential assistant will not be excluded.

[9] I do not believe Dillon's contrary testimony.

While Weatherman typed Dillon's letters, there is no evidence that any of them related to union or personnel matters. She said that the only union-related letters typed by her were notices to Respondent's counsel about the dates of the negotiating meetings held every few years. She testified without contradiction that she typed no intramural memoranda regarding labor policies, did not attend board meetings or internal management meetings, was not involved with negotiations, grievances, discipline, or rewards, and had nothing to do with payroll matters.[10]

Despite the fact that Weatherman worked for Dillon for 4 years, the only documents typed by her which Respondent introduced in evidence were minutes of meetings of the board of directors.[11] Those introduced contain references to the Hadley request for reinstatement, and I assume that other sets of minutes refer occasionally to personnel matters. However, these documents can hardly be considered confidential, since Respondent is a cooperative and presumably all members are entitled to see the minutes.[12] Moreover, the Board has held that occasional typing of material relating to personnel problems does not render an employee confidential in nature. *ITT Grin-*

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[10] Dillon testified that interviews with prospective employees "usually" are held in a conference room, and that, when "labor relations problems with the clerical people or with the outside people" arise, they are first handled by Spencer and Douglas, and then, if not resolved, "usually" considered by Dillon in a joint discussion in the conference room, where there is space for the participants.

[11] Weatherman typed these from drafts prepared by Respondent's counsel.

[12] Dillon agreed that Respondent has no "secret" papers.

nell Corporation, 212 NLRB 734 (1974); *Weyerhaeuser Company, supra.*

It is questionable whether Dillon falls into the category of "persons who formulate, determine, and effectuate" labor policies in the conjunctive sense intended by the Board in *B. F. Goodrich, supra.* While Spencer testified that Dillon was "responsible . . . for formulating management policies with regard to labor relations," Dillon himself testified that the board of directors in fact performed that function. While Spencer testified that determinations of "management policy concerning interpretations of the labor contract with the IBEW" were made by Spencer with "the approval" of Dillon, the latter testified that he had "no" function in "interpreting the labor contracts and labor relations among employees." Dillon further said that he participated "very little" in contract negotiations, although he would apparently be present at the meetings. It seems clear from Dillon's testimony that he plays a most passive role in labor and employee relations matters, and this obviously reflects on the assertedly "confidential" character of Weatherman's employment.

Dillon did, however, collect some papers relating to labor contract negotiations, including copies of the positions developed by Respondent's negotiating committee [13] and notes taken by him at negotiations, in "a file behind [his] desk." Weatherman has no duties with respect to these matters, and there is no evidence that she was even aware of the existence of the file.[14] But assuming that fact, the Board has never

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[13] These are handed to him directly by Respondent's counsel.

[14] Dillon also "kept . . . at my desk" reports by an executive committee of the board appointed to consider Hadley's request for reinstatement. These also were handed to him by Respondent's counsel.

held that potential physical access to confidential matters is sufficient to characterize an employee as a confidential.

Early on, the Board noted that the exception applied to employees "who *in the normal performance of their duties* may obtain advance information of the Company's position with regard to contract negotiations, the disposition of grievances, or other labor relations matters." *The Hoover Company*, 55 NLRB 1321, 1323 (1944), emphasis supplied. In *The Santa Fe Trail Transportation Company*, 119 NLRB 1302, 1304 (1958), the Board refused to exclude the "head file clerk who has charge of files in the general manager's office," and in *Hotel Employers Association of San Francisco*, 159 NLRB 143, 150 (1966), the Board stated, "Mere access to personnel records does not qualify an employee as a confidential employee." Following this line of cases, it was held in *Service Technology Corporation, a Subsidiary of LTV Aerospace Corporation*, 196 NLRB 1036, 1041 (1972), that an employee who had "access to [the project manager's] files, including those relating to personnel matters and such grievances as might arise," did not thereby act in a "confidential capacity" to him. Accord: *California Inspection Rating Bureau*, 215 NLRB 780 (1974). The possibility that Weatherman may have been in a position to rifle Dillon's desk no more makes her a confidential employee than does that same possibility convert the other nine clericals into confidentials; the fact is that she did not work with these concealed papers "in the normal performance of [her] duties."

Thus, even if Dillon were found to be the sort of conjunctive manager contemplated in *B. F. Goodrich*, it is clear that, as in *John Sexton & Co., Division of*

Beatrice Foods Co., 224 NLRB 1341 (1976), Weatherman's "duties do not involve her in a confidential capacity with his responsibilities" with respect to labor policies. Accordingly, I conclude that Weatherman was not a confidential employee as the Board defines that term.

Respondent's final contention is that Weatherman's signing of the petition did not constitute Section 7 activity because the petition concerned the plight of a former employee.[15]

Respondent relies on *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co., Chemical Division, et al.*, 404 U.S. 157 (1971), which held that changes in the benefits of retired employees are not a mandatory subject of bargaining. The question of whether retired employees are statutory "employees" represented by a union for purposes of Section 8(d) is, however, quite a different question from whether a petition circulated by active employees for the purpose of seeking the reemployment of a former colleague constitutes "concerted activities for the purpose of collective bargaining or other mutual aid or protection" within the meaning of Section 7.[16]

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[15] Although the record is unclear on this matter, and Hadley himself could not say exactly what his status was, I assume here that, as of May 1977, he had been officially removed from employment with Respondent. Dillon said Hadley "stop[ped] being an employee" in "approximately" April 1977.

[16] Indeed, in *Pittsburgh Plate Glass*, the Court did not deny the applicability of the statute to "applicants for employment" and "persons who have quit or whose employers have gone out of business"; it distinguished those cases because they involved individuals "who, unlike the pensioners here, were members of the active work force available for hire

In any event, the short answer to Respondent's argument, as General Counsel points out, is that the Board has only recently held that circulation of a petition seeking the reinstatement of a discharged employee is a protected concerted activity. *The Youngstown Osteopathic Hospital Association*, 224 NLRB 574 (1976).

I might also note the longstanding application of Section 7 to activities engaged in on behalf of non-employees, *N.L.R.B.* v. *Peter Cailler Kohler Swiss Chocolates Company, Inc.*, 130 F.2d 503 (C.A. 2, 1942), and employees in other bargaining units, *Signal Oil and Gas Company*, 160 NLRB 644 (1966), enfd. 390 F.2d 338 (C.A. 9, 1968). These cases turn on the potential for reciprocal support which the acting employees might bank on in the future. In the present case, there is the added factor that, in circulating the petition, the signers clearly had in mind not only Hadley's welfare but also their own future well being. The petition states, in part:

> It seems that the problem is no one is willing to speak up or defend what is right if it might mean jeopardizing one's own self. As long as you take care of number one, yourself, no one else matters. Well, other people do matter and Lloyd Hadley matters, to us and to many other people.
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> * * * *
>
> You hear much talk today about employees not wanting to give a full day's work for a full day's

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and at least in that sense could be identified as employees" (unlike the case before the Court, involving "individual[s] who [have] ceased work without expectation of further employment"). 404 U.S. at 168. But "further employment" for Hadley was precisely what the petition sought.

> pay, and not having any pride in their job; well, you just lost one that did. But what about the other side. Doesn't a company owe any kind of loyalty to an employee? When an employee gives you 15 years of work, doing more than his share, and then almost gives you his life, is this what he gets in return?

It seems plain that the Hadley case touched a collective nerve which inspired a group of ordinary citizens, who might not be individually "willing to speak up" because "it might mean jeopardizing one's own self," to boldly band together, finding needed strength in unity. And, in so uniting, they sought to arouse in Respondent a "kind of loyalty" which might not only serve Hadley's interest but also their own as well. By sparking some compassion for Hadley, the employees might have focused Respondent's attention on the need for greater generosity toward the work force as a whole. By taking up the cudgels for Hadley, the employees might have moved Respondent to appraise future disability retirement actions pertaining to themselves more conscientiously and deliberately. And, by obtaining Hadley's return to work and his successful performance thereof, the employees might have paved the way for their own return to work in similar circumstances.

In addition, it is reasonable to say that just as an expressed desire to have members of another racial group working alongside present employees literally relates to terms or conditions of employment, *N.L.R.B.* v. *Tanner Motor Livery, Ltd.*, 349 F.2d 1, 4 (C.A. 9, 1969), so too did this expression of a wish to have Hadley returned to the employment roster.

On the foregoing considerations, I conclude that the discharge of Weatherman on May 9, 1977, violated Section 8(a)(1) of the Act.

The complaint contains a separate allegation of unlawful interrogation. Martha Sellers, a bookkeeper, credibly testified that, on May 24, she went to Dillon "to talk to him about some problems in the office and about some feelings I had." She expressed the unease of the employees, in view of Weatherman's discharge, about having signed the petition. Dillon said the petition "had nothing to do with it" and that, if she did her job, she need not worry.[17] Sellers persistently alluded to the petition as the cause of Weatherman's discharge, and Dillon told her not to "mess with management." After some further discussion of other matters, Dillon asked "who passed the letter around and I said we weren't supposed to be talking about the letter."

Dillon did not testify about this conversation, and I credit Sellers. I further conclude that the question about "who passed the letter around" had a reasonable tendency to coerce Sellers in the exercise of such protected activity. It is true that Sellers initiated the conversation. It is also true that Dillon had attempted to assuage her concern that Weatherman's signature on the petition had caused her discharge. But Sellers had begun the talk by expressing her fear, and, by pressing the issue, had indicated to Dillon her continued uncertainty. When, after the discussion had passed on to other subjects, Dillon reverted to the matter which concerned Sellers and openly questioned her about the identify of the chief provocateur, I cannot imagine that such probing would not reasonably have led Sellers to infer an inordinate, and threatening, management interest in the matter. Her evasive answer so indicates.

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[17] Weatherman had filed her charge with the Board on the same day she was terminated.

I therefore find that Respondent coercively interrogated Sellers by the question Dillon posed on May 24, 1977.

CONCLUSIONS OF LAW

1. Hendricks County Rural Electric Membership Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging Mary M. Weatherman on May 9, 1977, Respondent violated Section 8(a)(1) of the Act.

3. By coercively interrogating Martha Sellers on May 24, 1977, Respondent violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act by certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

I shall recommend that Respondent be required to offer reinstatement to Mary M. Weatherman, and to make her whole for any loss of earnings she may have suffered by reason of her unlawful discharge, by payment to her of a sum of money equal to that which she normally would have earned from the date of discharge to the date of a valid offer of reinstatement, less her net earnings during that period, to be computed in the manner described in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). I shall

also recommend that Respondent post an appropriate notice.

Upon the foregoing findings of fact and conclusions of law, the entire record, and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended:

ORDER [18]

The Respondent, Hendricks County Rural Electric Membership Corporation, Danville, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or taking other adverse action against any employee in circumstances constituting interference with, restraint of, or coercion of employees in the exercise of their rights under Section 7 of the Act.

(b) Coercively interrogating employees about their protected concerted activities.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is designed to effectuate the policies of the Act:

(a) Offer to Mary M. Weatherman immediate and full reinstatement to her former job or, if such job no longer exists, to a substantially equivalent job, and

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[18] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

make her whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the backpay due under the terms of this recommended Order.

(c) Post at its place of business in Danville, Indiana, copies of the attached notice marked "Appendix." [19] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by its representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[19] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX F

Unpublished Order Not to Be Cited
Per Circuit Rule 35

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

ARGUED: JUNE 3, 1980

July 21, 1980

Before
HON. ROBERT A. SPRECHER, Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. WILLIAM J. CAMPBELL, Senior District Judge *

No. 79-1991

MALLEABLE IRON RANGE COMPANY, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

A Petition for Review of an Order from the
National Labor Relations Board

ORDER

This review requires us once more to consider whether the Board applied the proper standard in determining confidential employees excluded from a

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

bargaining unit under the National Labor Relations Act. 29 U.S.C. §§ 151 *et seq.*

The Company employs approximately 450 employees at its Beaver Dam, Wisconsin facility. Of these, about 265 employees in the factory are represented by Local 1953, International Brotherhood of Electrical Workers. In addition, approximately 100 employees in the foundry are represented by Local 34, International Molders and Allied Workers Union.

Local 39, Office and Professional Employees International Union, petitioned on December 18, 1978, to represent a residual unit of office clericals, technical and professional employees excluding managerial and confidential employees, guards, and supervisors and other union-represented employees. An evidentiary hearing was held from time to time between January 8 and 25, 1979, before a hearing officer, during which hearing the Company contested the inclusion of 35 employees within the bargaining unit proposed. The parties stipulated that 52 employees were excluded as managerial, supervisory or confidential employees. On February 27, 1979, the Regional Director found the Union's requested unit to be appropriate. The Company's Request for Review was denied by the Board. On March 28, the representation election was held and the vote was 40 for the Union and 15 against. The Union was certified on April 5, 1979.

The Company refused to bargain and on May 17 the Regional Director issued an unfair labor practice complaint. The Company answered on the grounds that the Regional Director's conclusions were erroneous as to the proper scope of the unit and as to the inclusion in the unit of employees who should properly have been excluded.

On July 26, 1979, we issued our opinion in *Hendricks County Rural Electric Membership Corp.* v.

N.L.R.B., 603 F.2d 25 (7th Cir. 1979), in which we concluded that *N.L.R.B.* v. *Bell Aerospace Co.*, 416 U.S. 267, 284 n.12 (1974), required us to hold that all confidential employees, and not only those in labor relations, were excluded from the protection of the Act.

On August 21, 1979, the Board granted the General Counsel's motion for summary judgment and found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the certified bargaining representation [*sic*] of its residual employees. The Company petitioned for review and the Board has cross-applied for enforcement of its order.

The Company has contended that at least 18 of its employees should be excluded from the unit because they have access to confidential information and are therefore confidential employees. The Board conceded that in determining the employees included in the unit it applied "the Board's traditional 'labor nexus' test" and not the test or standard established in *Hendricks* case. See Brief of Board at 32.

Although the Board enjoys broad discretion in designating bargaining units and also in determining "employees" protected by the Act, the bargaining unit designation must not "[overstep] the law," see *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485, 491 (1947), and the Board's determination that specified persons are "employees" under the Act is to be accepted only if it has "a reasonable basis in law." *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). If the Board oversteps the law in either respect, its designation or determination cannot be accepted. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166, 171-72

(1971). Where review of the Board's decision is frustrated by the failure of the Board to adhere to the law, the proper recourse of the reviewing court is to remand the proceedings to the Board. *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 442-43, 444 (1965). "[T]he case must be remanded to permit the Board to apply the proper legal standard . . . ." *N.L.R.B.* v. *Bell Aerospace Co.*, 416 U.S. 267, 289 (1974).

Enforcement of the order is denied and the proceedings are remanded for further consideration consistent with this order and with the *Hendricks* case.

CUDAHY, *Circuit Judge*, Dissenting in part.

I respectfully dissent. Although I am constrained by *Hendricks County Rural Electric Membership Corp.* v. *N.L.R.B.*, 603 F.2d 25 (7th Cir. 1979) (*"Hendricks I"*) to concede that in this Circuit "confidential secretaries" are excluded from the Act (whether or not their duties are labor relations-related), neither *Hendricks I* nor *N.L.R.B.* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) requires such a concession in the case of "confidential employees" in general. *See Hendricks County Rural Electric Membership Corp.* v. *N.L.R.B.*, No. 80-1283 (7th Cir. July —, 1980) (Cudahy, J., dissenting) (*"Hendricks II"*).

Only one of the challenged employees here is a secretary, Arlene Oelke. Oelke is the assistant and secretary to the manager of industrial sales. In her case a remand might be needed to apply the new test of *Hendricks I* and *Hendricks II*, which does not require that the alleged confidential relationship involve labor relations.

I fear that the application of the majority's new test for excluded "confidential employees" may demonstrate both its lopsidedness in principle and its potentially sweeping impact on the statutory protection, particularly of white collar workers. *See Union Oil Company of California* v. *N.L.R.B.*, 607 F.2d 852, 853 (9th Cir. 1979).

APPENDIX G

Unpublished Per Curiam Order

NLRB JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

July 21, 1980

Before
HON. ROBERT A. SPRECHER, Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. WILLIAM J. CAMPBELL, Senior District Judge *

No. 79-1991

MALLEABLE IRON RANGE COMPANY, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

A Petition for Review of an Order from the
National Labor Relations Board

This cause came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that enforcement of the order of the National Labor Relations Board reviewed in this matter be, and the same is hereby, DENIED and the proceedings are REMANDED, with costs, in accordance with the order of this court filed this date.

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

APPENDIX H

JMT
D—5462
Beaver Dam, WI

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 30—CA—5206

MALLEABLE IRON RANGE COMPANY

and

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 39,
AFL—CIO—CLC

DECISION AND ORDER

Upon a charge filed on May 8, 1979, by Office and Professional Employees International Union, Local 39, AFL—CIO—CLC, herein called the Union, and duly served on Malleable Iron Range Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 30, issued a complaint on May 17, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 5, 1979, following a Board election in Case 30—RC—3482 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about May 1, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On May 29, 1979, Respondent filed a motion to dismiss the complaint because it failed to set forth a notice of hearing or in the alternative to fix an answer date. On June 8, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.[2]

On June 25, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on June 29, 1979, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should

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[1] Official notice is taken of the record in the representation proceeding, Case 30-RC-3482, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] Thus, it appears Respondent abandons its motion to dismiss the complaint.

not be granted. Respondent thereafter filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and opposition to the Motion for Summary Judgment, Respondent admits that the Union has requested that it bargain and that it has refused to do so, but contends that the certification of the Union is invalid because the unit certified is inappropriate for the purposes of collective bargaining.

Review of the record herein, including that in the representation proceeding, Case 30—RC—3482, establishes that, upon a petition duly filed under Section 9(c) of the Act, a hearing was held before a hearing officer of the National Labor Relations Board. Thereafter, the Regional Director issued a Decision and Direction of Election, wherein he found that the petitioned-for unit of all full-time and regular part-time office and clerical employees, technical employees, and professional employees employed at the Employer's Beaver Dam, Wisconsin, facility, but excluding professional, managerial, and confidential employees, outside sales personnel, guards and supervisors as defined in the Act, and all other employees in bargaining units represented by other labor organizations, constitutes an appropriate unit for the purposes of collective bargaining, and directed that

an election by secret ballot be conducted among the employees in that unit. The Regional Director further directed that a separate ballot be used for recording the vote of the one professional employee and that, if said employee did not vote for inclusion in the unit with nonprofessional employees, a unit confined to office, clerical, and technical employees, excluding professional employees, would be appropriate for the purposes of collective bargaining.

Respondent filed a timely request for review and brief in support of the request for review of the Regional Director's Decision and Direction of Election, alleging, in substance, that the Regional Director made erroneous factual conclusions that a number of employees were not managerial employees or supervisors and that, by including these employees in the unit, the Regional Director departed from reported precedent requiring that managerial employees be excluded from the collective-bargaining unit. By telegraphic order of March 22, 1979, the Board denied Respondent's request for review.

On March 28, 1979, a secret-ballot election was conducted among employees in the aforementioned bargaining unit. The one professional eligible voter cast a valid ballot against inclusion with nonprofessionals. With respect to the remaining ballots, the tally was 40 for, and 15 against, the Union; there were no challenged ballots. Thus, a majority of the employees of Respondent in the appropriate unit, excluding professional employees, selected the Union as their representative for purposes of collective bargaining. On April 5, 1979, the Regional Director issued a Certification of Representative.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special

circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent, a Wisconsin corporation with its principal place of business in Beaver Dam, Wisconsin, is engaged in the manufacturing of castings and appliances and jobbing work. Respondent, in the course

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[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c). On July 11, 1979, Respondent filed a motion entitled "Motion to Reopen Record to Admit Exhibit as Newly Discovered Evidence." On July 23, 1979, the General Counsel filed a motion in opposition to Respondent's motion. The Board hereby denies Respondent's motion, as the evidence Respondent seeks to present does not constitute newly discovered evidence of which it was excusably ignorant.

and conduct of its business, annually derives gross revenues in excess of $50,000 from selling and shipping goods and materials, in interstate commerce, from its Wisconsin location directly to points outside the State of Wisconsin.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Office and Professional Employees International Union, Local 39, AFL—CIO—CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time office and clerical employees and technical employees employed at the Employer's Beaver Dam, Wisconsin, facility, but excluding professional, managerial, and confidential employees, outside sales personnel, guards and supervisors as defined in the Act and all other employees in bargaining units represented by other labor organizations.

2. The certification

On March 28, 1979, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 30, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on April 5, 1979, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about April 27, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about May 1, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since May 1, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding a signed agreement.[4]

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*,

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[4] The General Counsel's request that the Board order Respondent to pay to the Board and the Union reasonable costs and expenses incurred by them in the investigation of this case including reasonable counsel fees and expenses is hereby denied as lacking in merit.

140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record makes the following:

Conclusions of Law

1. Malleable Iron Range Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Office and Professional Employees International Union, Local 39, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.
3. All full-time and regular part-time office and clerical employees and technical employees employed at the Employer's Beaver Dam, Wisconsin, facility, but excluding professional, managerial, and confidential employees, outside sales personnel, guards and supervisors as defined in the Act and all other employees in bargaining units represented by other labor organizations, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. Since April 5, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.
5. By refusing on or about May 1, 1979, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has en-

gaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Malleable Iron Range Company, Beaver Dam, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Office and Professional Employees International Union, Local 39, AFL-CIO-CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time office and clerical employees and technical employees employed at the Employer's Beaver Dam, Wisconsin, facility, but excluding professional, managerial, and confidential employees, outside sales personnel, guards and supervisors as defined in the Act and all other employees in bargaining units represented by other labor organizations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Beaver Dam, Wisconsin, facility copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. August 21, 1979

HOWARD JENKINS, JR., Member

BETTY SOUTHARD MURPHY, Member

JOHN C. TRUESDALE, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Office and Professional Employees International Union, Local 39, AFL-CIO-CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time office and clerical employees and technical employees employed at the Employer's Beaver Dam, Wisconsin, facility, but excluding professional, managerial, and confidential employees, outside sales personnel, guards and supervisors as defined in the Act and all

other employees in bargaining units represented by other labor organizations.

MALLEABLE IRON RANGE COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Commerce Building, Suite 230, 744 North Fourth Street, Milwaukee, Wisconsin 53203, Telephone 414-291-3866.

APPENDIX I

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Beaver Dam, Wisconsin

Case No. 30-RC-3482

MALLEABLE IRON RANGE COMPANY,[1] EMPLOYER

and

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 39,
AFL—CIO—CLC,[2] PETITIONER

DECISION AND DIRECTION OF ELECTIONS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act (herein called the Act), a hearing was held before a Hearing Officer of the National Labor Relations Board (herein called the Board). The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

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[1] The name of the Employer appears as amended at the hearing.

[2] The name of the Petitioner appears as amended at the hearing.

Upon the entire record in this proceeding,[3] the undersigned finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The Employer is a Wisconsin corporation engaged in the manufacturing of castings and appliances and jobbing work at its Beaver Dam, Wisconsin location. Petitioner seeks to represent all full-time and regular part-time office clerical, technical and professional employees employed by the Employer, but excluding all managerial and confidential employees, outside sales personnel, guards and supervisors as defined in the Act and all other employees in bargaining units represented by other labor organizations. The Employer, while not disputing the appropriateness of a unit whose scope is limited to office clerical employees, would exclude technical, professional and

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[3] The Petitioner has timely filed a brief which has been duly considered. At the close of the hearing, the Hearing Officer ordered that briefs be submitted to the undersigned by the close of business February 6, 1979 (all dates are 1979). Thereafter, on February 1, the Employer requested an extension of time to March 1 to submit its brief. An extension to February 15 was granted. On February 9 the Employer sought yet another extension to February 26, which request was denied. Ultimately the Employer did submit a brief, albeit untimely. Nevertheless, I have considered the facts and arguments advanced by the Employer both in its brief and at the hearing.

confidential employees and both inside and outside sales personnel.

The Employer employs approximately 450 individuals at its Beaver Dam facility. Of these, approximately 265 employees in the factory are represented by Local 1953, International Brotherhood of Electrical Workers. The recognition clause of the current contract between Local 1953 and the Employer provides:

> The company recognizes the union as the sole collective bargaining agent for its production and maintenance employees, including pattern shop employees, but excluding foundry employees, office clerical employees, time study men, shop clerks, guards, professional employees, executives and sub-executives, foremen and other supervisors as defined in the Labor Management Relations Act.

In addition Local 34, International Molders and Allied Workers Union, AFL-CIO represents approximately 100 employees in the Employer's foundry. The recognition clause of the current contract between Local 34 and the Employer provides:

> The company recognizes the union as the sole collective bargaining agent for its foundry and production and maintenance employees, excluding executives, subexecutives, foremen, time study men, shop or time clerks, apprentices or trainees, guards, salesmen, or office and clerical employees.

As noted, Petitioner herein seeks an official clerical, professional and technical unit which appears to be a residual unit of those nonsupervisory employees employed at the Employer's Beaver Dam facility. There is no evidence of any bargaining history in the peti-

tioned-for unit. No other union seeks to represent these employees and certain categories of employees (e.g., time study men) are specifically excluded from the currently represented bargaining units. Much evidence was elicited by the Employer concerning the status of numerous employees to determine whether they are technical, professional, managerial, supervisory or confidential. The Act requires in Board certified units that supervisory employees be excluded from employee bargaining units. The Supreme Court has interpreted the Act to require the exclusion of managerial employees. *N.L.R.B.* v. *Bell Aerospace, Division of Textron, Inc.*, 416 U.S. 267 (1974). Board policy requires the exclusion of confidential employees. *Ladish Co.*, 178 NLRB 90. On the other hand technical employees may be included in an office clerical unit where the two groups share a sufficient community of interest. *Siemens Corp.*, 224 NLRB 1579. Similarly where professional employees share a community of interest with nonprofessional employees, the two groups may be combined into a single unit provided the professional group is afforded a self-determination election, as provided for in Section 9 (b) (1) of the Act. *Sonotone Corporation*, 90 NLRB 1236. It appears that those employees sought by Petitioner, including those who might be classified as either technical or professional employees, work in the same general area as the office clerical employees, have the same fringe benefits, have daily contact with office clerical employees, share common supervision and are involved in seeing that the Employer's product is produced. Accordingly and inasmuch as no other union seeks to represent these employees, I find that the scope of the unit sought by Petitioner is appropriate. Because there may be issues relative to the

scope of the unit raised at a later time, I will pass on whether employees are technical or professional. There remains the question of unit placement.

Technical Services Section:

There are eight employees in the technical services section (research and development department) whom the Employer would exclude from the unit. The Employer claims that Herbst, Kostolni, Lehmann, Heidemann, Kaiser and W. Murphy are technicals. The Employer also asserts Murphy is a supervisor. The Employer would exclude Nagarkar as a professional. Herbst, Kostolni and Lehmann are all draftsmen. Lehmann, who is the most experienced of the three, runs blueprints on a copy machine and also designs blueprints. Herbst and Kostolni perform the same work as Lehmann but for outside jobs. Lehmann had 3 years of high school drafting. Kostolni had 4 years of high school drafting and Herbst had vocational school drafting after high school, but he learned his job responsibilities during his 24 years with the Employer. T. Kaiser is the solid fuel development engineer. There is no evidence Kaiser has an advanced degree or training. He performs all of the "engineering functions" for the solid fuel division which includes decisions to make or buy parts. He also does "paper work" in listing and classifying appliances for Underwriter's Laboratories. L. G. Heidemann is quality control engineer for technical services and sees to it that the Employer's gas appliances meet the American Gas Association Standards. Heidemann has taken college courses in mathematics and English but apparently has no degree. W. Murphy puts in writing the methods by which the appliances will be manufactured which ultimately is converted into a

computer program. His job essentially entails that the most efficient methods are utilized to minimize production costs and maximize production. Nagarkar, who is the only individual in dispute who has an engineering degree, is involved with electrical appliances at Underwriter's Laboratories and the Canadian Standards Association. The generalized testimony concerning Kaiser, Heidemann and Nagarkar reveals that their function apparently is to monitor various codes and insure that they are complied with by ordering the proper parts for goods in process or planned. Murphy is a coordinator for the production process. The head of technical services, James Polzin, testified that his job does not require a degree but only technical school training or experience. Based on the entire record, I conclude these employees are technicals. As technicals, they should nevertheless be included in the unit, as they come in contact with office employees and have a significant community interest with office clerical employees, as described above. With respect to Murphy, the Employer also asserts he is a supervisor. Murphy "supervises" only one employee—his secretary. There is no evidence, however, Murphy possesses any of the indicia of supervisory authority except the power to grant time off to his secretary and there is no evidence he has ever exercised that authority. I find and conclude that Murphy is not a supervisor within the meaning of the Act and is included in the unit.

Consumer Products Marketing Section:

The Employer disputes the placement of several individuals who are classified in this section. The Employer contends that Margaret Schmitt, Susan Putnam and Lola Kuzniewicz, all of whom work in

distribution and service, are confidential employees. The Employer also asserts Kuzniewicz is a managerial employee. Schmitt is salaried and handles all paperwork relative to warehouse stock, Putnam is hourly paid[4] and performs dispatch functions such as routing shipments and making up bills of lading. Lola Kuzniewicz handles incoming mail, answers phone calls from dealers and distributors and processes credits. This latter function is routine and is done in accordance with Employer's warranty policy. All three perform clerical functions and none of them work in a confidential capacity for a person involved in the formulation, determination and effectuation of the Employer's labor relations policies. That they have access to certain customer or supplier information—information which the Employer believes should be kept confidential—does not render them "confidential employees" as that term has been used by the Board. Union membership is not incompatible with an employee's duty of loyalty to her employer, even when the duty involves a responsibility to maintain confidentiality. *Dun & Bradstreet, Inc.*, 194 NLRB 9. I find, therefore, Schmitt, Putnam and Kuzniewicz are not confidential employees. Nor do I find Kuzniewicz to be a managerial employee, as her issuance of credits is done on a routine basis without any discretion independent of the Employer's established policy.

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[4] Testimony revealed that some unrepresented employees are salaried, while others are hourly paid. There is no consistent pattern to indicate what accounts for the difference except that new employees are generally hourly paid, while more senior employees are generally salaried. Some part-time employees are hourly paid while others are on salary.

The Employer contends Brian Christopherson, the assistant in advertising, should be excluded as managerial employee. Likewise, the Employer would exclude Sharon Neumann as a confidential, managerial employee and Lawrence Keegstra and M. Wallendal as technicals. The Employer also asserts Keegstra is a supervisor. Christopherson writes copy for advertising and coordinates the advertising function with other departments and with the media. There is no evidence Christopherson formulates and effectuates *management* policies by expressing and making operative the decisions of the Employer. Nor does it appear Christopherson has discretion in the performance of his job independent of the Employer's established policy. He therefore is not a managerial employee. *General Dynamics Corp., Convair Aerospace Div.*, 213 NLRB 851. I shall include him in the unit. Neuman works in the mail room and opens mail. Such activity does not vest an employee with either confidential or managerial status. She is also included in the unit. Both Keegstra and Wallendal work in the Employer's print shop and handle all the Employer's inhouse printing. Printers are not technical employees, as that term is used by the Board. Nor is Keegstra a supervisor. Keegstra has none of the indicia of supervisory authority except the asserted power to "reprimand" Wallendal which he has never done. Keegstra earns 20 percent more pay than Wallendal but that appears to be the result of his greater experience. I conclude therefore that both Keegstra and Wallendal are properly included in the unit and eligible to vote in the election.

The Employer asserts that H. Turner, the custodian, is not a clerical employee and should be excluded from the unit. Turner is responsible for clean-

ing the basement level of the office and is hourly paid. Turner works from 1 p.m. to Midnight, while the office normally closes at 4:30 p.m. Turner is supervised by Donald Dohmann, the manager of advertising, and Turner receives the same vacation, holidays and medical insurance as administration and clerical employees. His duties daily bring him into the office areas. Turner does not do any work in the production areas of the plant. Based on all of the above, I conclude that Turner, who is not represented in either existing bargaining unit, shares a sufficient community of interest with office clerical employees to warrant his inclusion in the unit.

The Employer would exclude Janet Yelk as a managerial or confidential employee. Yelk, who is hourly paid, earns $3.65 an hour and works for the manager of the parts department. She sorts mail, fills out parts orders, waits on customers who come off the street and works the switchboard for 15 minutes each afternoon. These are not the duties of a managerial or confidential employee. I shall, therefore, include her in the unit. She is eligible to vote in the election conducted herein.

The Employer would also exclude Bill Pfingsten as a confidential employee, or as an outside salesman. Pfingsten, who handles telephone sales from the Employer's Beaver Dam facility, receives a straight salary unlike outside salesmen who receive a salary plus commission. The fact that Pfingsten may have access to dealer information does not render him a confidential employee, as defined by the Board. He is, therefore, included in the unit.

Industrial Sales Section:

The Employer contends that Bernice Riske and Arlene Oelke should be excluded from the petitioned-for unit. The Employer asserts that Riske, who has the title of production control manager, is a managerial employee. The Employer's organization charts show Riske performs order entry and billing functions. Riske relays orders to the factory, maintains a file of all orders in the foundry and sees that orders are entered into the data processing system. She also writes up bills of lading. Until January 1979, she spent 4 hours per day on the switchboard. These are clerical, not managerial, functions, and I shall include her in the unit.

Oelke is alleged by the Employer to be a confidential or managerial employee. She is the assistant and secretary to the manager of industrial sales. Oelke handles all calls from outside customers concerning pricing and delivery. She performs certain dispatching functions and transfers information from purchase orders to the Employer's internal procurement forms. Oelke types all letters sent to field representatives. These are also clerical, not managerial, functions. The fact that Oelke handles certain pricing and costing information does not render her a "confidential employee" as that term is used by the Board. I shall include her in the unit.

Factory Section:

The Employer contends that Jeff Omen, T. Czeszynski and D. Thomas are plant clericals and that P. Marx, R. Binder, E. Belott and J. Grace are technical or managerial employees. The Employer also asserts that the nurse, Frank Schuster, is a professional employee who should be excluded from the unit. Omen

is a blueprint clerk who takes production releases from production control to which he attaches computer printouts of work done or to be done. Omen then routes these documents to insure production. Czeszynski and Thomas are "job loaders" who see to it that work orders or releases are timely performed to assure proper delivery to customers. They perform expediting functions in the factory. They report to the production control supervisor. Omen, Czeszynski and Thomas spend the majority of the day in the plant and handle paperwork necessary to production. Although the work they perform might be plant clerical in nature, it appears these individuals do share a community of interest with the office employees. Thus the job loaders share the same fringe benefits such as insurance, days off and vacation as general office employees. I also note that they are excluded from the two production and maintenance units, and that if they are not included in the petitioned-for unit, they will be unrepresented. I shall include them in the unit.

Marx, Binder, Belott and Grace are all time study engineers who have been trained on the job. Each takes time studies, effort ratings and routings. They cannot, however, change rates. While the information they collect may be used by the Employer in handling grievances which arise in the factory and in the foundry, they do not themselves resolve grievances. The training and work of the time study engineers renders them technical employees. *Plankington Packing Company*, 116 NLRB 1225, 1233-1234. Nevertheless, their pay, hours and other working conditions give them a sufficient community of interest to warrant their inclusion in an office clerical unit. The work they perform and their inability to exercise

independent judgment and discretion in key areas reveals they are not managerial employees. I shall include them in the unit.

Frank Schuster is a registered nurse who works in an office at the Employer's facility. The parties stipulated Schuster is a professional employee. The fact that he orders supplies for his nursing department and fills out forms on workman's compensation claims and insurance claims does not render him a managerial employee. Those decisions he makes concerning industrial accidents appear to be the result of his professional judgment, rather than as a result of any managerial authority vested in him. Schuster shall be included in the unit, if he so chooses.

Purchasing Section:

The Employer asserts that buyers R. Klein and C. Polzin are managerial employees. Polzin buys the steel and Klein purchases the trim items. Each must operate within parameters set by the Employer. It thus appears their discretion and latitude for independent action takes place within the confines of the Employer's general directions. I conclude that they are not managerial employees and should be included in the unit. *Bell Aerospace Co., Div. of Textron, Inc.*, 219 NLRB 384.

Controller Section:

The Employer contends that Barbara Knoll, who works in the payroll department is a supervisor, as defined in the Act. Knoll has never hired or fired anyone, has not interviewed applicants for employment and does not recommend employees for promotion. She has submitted employees' names for merit

raises, but there is no indication the recommendations were effective. Knoll reviews the time-tickets of production employees and computes their pay. She handles the paperwork relating to the vacations taken by factory and foundry employees and writes up an absence report. Knoll has not issued any written disciplinary warnings. The employees in the payroll department have certain assigned duties which they regularly perform. Knoll testified she gave out a verbal warning "quite sometime ago," but there is no specific evidence concerning the events surrounding this warning. Based on the record as a whole, I conclude that Barbara Knoll is not a supervisor within the meaning of the Act. She is included in the unit and eligible to vote in the election herein.

The Employer contends that Larry Wendlandt, the assistant manager and programmer in the electronic data processing services department, should be excluded as a supervisor or technical employee. Wendlandt has had training in programming from a school run by IBM. He has access to payroll information, inventory, accounts payable, accounts receivable, sales analysis and costing analysis all of which he may put into a program. There is no evidence that Wendlandt possesses any supervisory authority, so I shall not exclude him from the unit on that basis. Based on the entire record, it does appear he is a technical employee. *Computer Systems, Inc.*, 204 NLRB 255; *The Ohio Casualty Insurance Company*, 175 NLRB 860. I shall include him in the unit.

The Employer would exclude David Soldner as a professional or managerial employee. Soldner works as the assistant cost manager in the cost department.

He costs out range parts, factory sales parts and foundry parts and prepares invoices for IBM. He costs out jobs by calculating the Employer's material and labor costs and adding on a predetermined markup; he has access to the Employer's customers' names and sales figures. The information he obtains relative to costing comes from previously prepared cost-sheets. Soldner has a high school education and on-the-job training. There is no indication that Soldner 's job requires any of the training or skills required of a professional employee, nor is there indication he possesses any of the indicia of a supervisor or a managerial employee. I find that Soldner is not a managerial or professional employee and that he is not a supervisor. He is, therefore, included in the unit.

The Employer would exclude Linda Anderson as a supervisor or confidential employee. Anderson is a computer operator in the electronic data processing department. Anderson has access to the same information as Wendlandt and as the two keypunch operators—who the parties stipulated to be in the unit. There is no evidence Anderson is a confidential employee as that term is used by the Board. Nor is there any evidence she possesses any of the indicia of supervisory status. I conclude, therefore, that Anderson is neither a supervisor nor a confidential employee and that she should be included in the unit.

The Employer would exclude Linda Kuehn as a technical or confidential employee. Kuehn is a clerk in the cost department. She checks invoices that are returned from key punch for errors. She attaches bills of lading to the invoices and helps with the costing of range parts and outside sales parts. She has access to the cost of parts and to customer

prices. These jobs and functions are those of a clerical employee, not of a technical or confidential employee. Kuehn is included in the unit and eligible to vote in the election.

Secretary and Treasurer Section:

The Employer would exclude Dennis Krause from the unit as a professional or managerial employee. Krause is the assistant manager in the credit department. He checks in the cash each day and records it on the ledgers. He brings correspondence up to date for delinquent dealers and determines whether a dealer is delinquent by looking at the monthly statements. Krause does not determine what the Employer's credit policy is, or should be. Krause knows the amount of cash on hand for the Employer and the volume of the accounts receivable. Although Krause has a college degree in accounting, he testified that a basic bookkeeping course would cover the kind of work he does. Based on the requirements of Krause's job and his lack of ability to formulate policy for the Employer, I find Krause is neither a professional nor a managerial employee. I shall include him in the unit.

The Employer would exclude Mary Anne Schwantes as a confidential employee. Schwantes assists the chief bookkeeper and is involved in processing accounts payable. That she, like her counterpart Yelk in the parts department, has access to "sensitive [credit] data," does not render her a confidential employee. I shall include her in the unit.

Based on the above facts and circumstances, I find that a unit of all full-time and regular part-time office and clerical employees, technical employees and professional employees employed at the Employer's

Beaver Dam, Wisconsin facility, but excluding all managerial [5] and confidential employees,[6] outside sales personnel, guards and supervisors as defined in the Act and all other employees in bargaining units represented by other labor organizations constitutes a unit appropriate for the purposes of collective bargaining within the meaning of the Act. However, as this unit includes professional and nonprofessional employees whom the Board cannot join in a single unit without the desires of the professional employee being determined in a separate vote,[7] I shall direct that a separate ballot be used for recording the vote of the registered nurse, which will ask two questions:

> (1) Do you wish to be included in the same unit as the office and clerical employees and technical employees employed by the Employer at its Beaver Dam, Wisconsin facility for the purposes of collective bargaining?
>
> (2) Do you desire to be represented for the purpose of collective bargaining by Office and Professional Employees International Union, Local 39, AFL-CIO-CLC?

If the professional employee votes yes to the first question indicating his desire to be included in the unit with the nonprofessional employees, he will be so included. His vote on the second question will then be counted with the votes of the nonprofessional employees to decide the representative for that bargain-

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[5] The parties stipulated that D. Legas is a managerial employee.

[6] The parties stipulated that A. Hupke, L. Wendt and K. Weckworth are confidential employees.

[7] *Sonotone Corporation*, 90 NLRB 1236.

ing unit. If, on the other hand, he does not vote for inclusion, his vote on the second question will not be counted, as a one-person unit may not be certified under Board practice. *Home of Guiding Hand*, 218 NLRB 1278, 1280.

Accordingly, I find the following unit to be appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time office and clerical employees, technical employees and professional employees [8] employed at the Employer's Beaver Dam, Wisconsin facility, but excluding managerial and confidential employees, outside sales personnel, guards and supervisors as defined in the Act and all other employees in bargaining units represented by other labor organizations.

DIRECTION OF ELECTIONS

Election by secret ballot shall be conducted by the undersigned among the employees in the nonprofessional and the professional voting groups found described above at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because

---

[8] If, however, the professional employee does not vote for inclusion in the unit with nonprofessional employees, I find a unit confined to office and clerical and technical employees, excluding professional employees to be appropriate for purposes of collective bargaining.

they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election dates and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. In the nonprofessional group those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Office and Professional Employees International Union, Local 39, AFL-CIO-CLC. For the professional employee, the same choice will appear, as well as the propositions set forth above.

LISTS OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an election eligibility list for the non-

professional voting group and for the professional employee, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such lists must be received in the Regional Office, Suite 230, Commerce Building, 744 North Fourth Street, Milwaukee, Wisconsin 53203 on or before March 6, 1979. No extension of time to file these lists may be granted, nor shall the filing of a request for review operate to stay the filing of such lists except in extraordinary circumstances. Failure to comply with the requirement shall be grounds for setting aside the elections whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by March 12, 1979.

Dated at Milwaukee, Wisconsin this 27th day of February 1979.

/s/ George Squillacote,
GEORGE SQUILLACOTE,
Regional Director
National Labor Relations Board
Thirtieth Region
Suite 230, Commerce Building
744 North Fourth Street
Milwaukee, Wisconsin 53203

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FILED
APR 29 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-885 and 80-1103

In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD,
Petitioner

—*v.*—

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

and

MALLEABLE IRON RANGE COMPANY

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION,
Petitioner

—*v.*—

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

PETITION FOR CERTIORARI IN NO. 80-885 FILED DECEMBER 1, 1980

PETITION FOR CERTIORARI IN NO. 80-1103 FILED JANUARY 3, 1981

CERTIORARI GRANTED MARCH 2, 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-885 and 80-1103

NATIONAL LABOR RELATIONS BOARD,
Petitioner

—*v.*—

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

and

MALLEABLE IRON RANGE COMPANY

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION,
Petitioner

—*v.*—

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Chronological List of Relevant Docket Entries in Case No. 30-CA-5206 and 30-RC-3482 (*Malleable*)	2

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Hendricks

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Wallace E. Dillon (for the General Counsel)

Direct 4

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Case No.: 25-CA-8921

IN THE MATTER OF:
HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

5.9.77 Charge filed

6.30.77 Complaint and Notice of Hearing, dated

7.7.77 Employer's Answer, dated

7.7.77 Employer's Motion to Dismiss the Complaint, dated

7.13.77 General Counsel's Response in Opposition to Employer's Motion to Dismiss, dated

7.14.77 Order Rescheduling Hearing, dated

7.22.77 Administrative Law Judge's Order denying Employer's Motion to dismiss the Complaint, dated

10.17.77 Order Rescheduling Hearing, dated

12.22.77 Hearing opened

1.9.78 Hearing closed

4.4.78 Administrative Law Judge's Decision issued

5.3.78 Exceptions of Employer to Decision of Administrative Law Judge, received

5.15.78 Employer's Motion to Strike General Counsel's Brief to the Board, dated

7.17.78 Decision and Order issued by the National Labor Relations Board

10.10.79 Board's letter advising the parties that it had decided to accept the remand, and that the parties could file Statements of Position with respect to the issue raised by the remand, dated

11.9.79 General Counsel's Statement of Position, dated

11.12.79 Employer's Statement of Position, dated

1.22.80 Supplemental Decision and Order issued by the National Labor Relations Board

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Case No.: 30-CA-5206

IN THE MATTER OF:
MALLEABLE IRON RANGE COMPANY

30-RC-3482

12.18.78 Petition, dated

12.20.78 Notice of Representation Hearing, dated

12.26.78 Order Rescheduling Hearing, dated

1.8.79 Hearing opened

1.25.79 Hearing closed

1.29.79 Hearing Officer's Report, dated

2.15.79 Union's Brief, received

2.26.79 Employer's Brief to the Regional Director, dated

2.27.79 Decision and Direction of Elections, dated

3.15.79 Employer's Request for Review, dated

3.22.79 Board's teletype denying Employer's Request for Review of Regional Director's Decision and Direction of Election, dated

3.28.79 Notice of Election, held

3.28.79 Tally of Ballots of election, held

3.28.79 Tally of Ballots for Voting Group (B) of election, held

3.28.79 Certification on Conduct of Election, held

30-CA-5206

5.8.79 Charge, filed

5.15.79 First Amended Charge

5.17.79 Complaint, dated

5.29.79 Motion to Dismiss Complaint, dated

5.31.79 Notice of Hearing, dated

6.8.79 Answer, dated

6.21.79 Motion for Summary Judgment, dated

6.29.79 Order Transferring Proceeding to the Board and Notice to Show Cause, dated

7.11.79 Motion to Reopen Record to Admit Exhibits as Newly Discovered Evidence, dated

7.11.79 Memorandum in Support of Motion to Reopen Record to Admit Newly Discovered Evidence, dated

7.11.79 Statement in Opposition to Motion for Summary Judgment, dated

7.20.79 General Counsel's Motion in Opposition to Employer's Motion to Reopen Record to Admit Exhibit as Newly Discovered Evidence, dated

8.21.79 Decision and Order issued by the National Labor Relations Board, dated

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE ADMINISTRATIVE LAW JUDGE—

December 22, 1977

Wallace E. Dillon, Witness

DIRECT EXAMINATION

BY MR. HAYES:

* * * *

[6] Q How long have you been General manager?

A For about 14 years.

Q Mr. Dillon, are you in charge of the day-to-day operation of the REMC?

A That is true.

Q Now, throughout my questioning, rather than saying "Hendricks County REMC", I will just refer to it as the "REMC", all right and that's what we're talking about?

A Okay.

Q To whom do you report, Mr. Dillon?

A I report to the Board of Directors.

Q How many such members are there?

A Presently, we have 9.

* * * *

[8] Q Your office clerical employees are represented by a union, correct?

A No, that is incorrect.

Q Strike that. Your Office clerical employees are not represented by a union?

A That's correct.

Q Your outside employees are represented by a union, correct?

A That is correct.

Q And, there is an existing collective bargaining agreement between your company and the union with respect to the outside employees, right?

A Yes.

* * * *

[11] Q Now, what happened to the personnel files, if anything, Mr. Dillon?

A As I stated earlier, I was informed by my assistant, that she came back into the office and picked it up.

Q Where was this file maintained?

A In her office, in her side of the office; we share the same office, with a partition in between.

Q Was she authorized to take that file, Mr. Dillon?

A No, she was not.

JUDGE RIES: Who was your assistant?

THE WITNESS: Pardon?

JUDGE RIES: Who was the assistant who told you that?

THE WITNESS: Wayne Spencer is our assistant manager.

JUDGE RIES: Did Mr. Spencer say he saw her take the personnel file?

THE WITNESS: That I can't say; he informed me that she came back in and told him that she had got her file.

• • • •

[37] Q Isn't it true that Mr. Hadley was a member of Local 1393 of the National Brotherhood of Electrical Workers?

A Yes, that's true.

Q And, this is a local that represents the outside employees at the REMC?

A Yes.

• • • •

CROSS-EXAMINATION

BY MR. OBREMSKY:

• • • •

[74] Q All right. Now, whose responsibility was it to handle insurance claims?

A Basically, it was Mary Mae's.

Q What function or position did she have with the REMC?

A She was my secretary, legal secretary; or, she was my secretary, I'll put it that way.

Q She handled all of your correspondence?

A Yes, except for those periods of time she was on vacation, of course.

• • • •

[82] Q Now, on Monday the 9th, did you receive the form from Dr. Capello?

A Yes, I did.

Q And, about when did you receive it?

A Well, I'm going to say it was probably a little before 10:00 o'clock, because she opened my mail and that's probably when I got around to looking at it.

Q Was it her practice to open all your mail?

A Yes.

Q And then, did she review your mail and—

MR. HAYES: Objection; leading.

BY MR. OBREMSKY:

Q What did she do with the mail after she opened it?

A After she opened it, she usually would write on the department who it was supposed to go to.

[83] Q She would read the mail?

A Yes, I'm assuming, she about had to, which department it would go to.

• • • •

G.C. # 4

BANKERS LIFE COMPANY DES MOINES, IOWA

INSTRUCTIONS TO INSURED

(1) This form is to be filed as soon as it appears that you will qualify for disability benefits.

(2) Complete the Statement of Insured below and Part A on the reverse side. Have your physician complete Part B on the reverse side.

(3) Return form to the Group Policyholder.

STATEMENT OF INSURED

Your name Lloyd Hadley Telephone number 317-745-2962

Your occupation Lineman Date of birth 3/23/24 Social Security No. 311-22-3742

When did you become wholly unable to work? Date February 10, 1976 Hour 10:10 A.M. ~~P.M.~~

Have you been continuously disabled since you became unable to work? ☐ Yes ☒ No

If yes, approximately when do you feel you will be able to resume work?

If no, when did you again become able to work? Date February 28, 1977 Hour A.M. P.M.

Is disability due to ☒ accident or ☐ sickness. (If accident, describe, including date and place. If sickness, when did symptoms first appear?) 2/10/76 - Southeast of Bainbridge, pole # N-102 1/2L-91R-128R-25, Came in contact with 7200 volts.

Have you been hospital confined? ☐ Yes ☐ No. If yes, when? From Feb. 10, 1976 to April 26, 1976 ~~June 19, 1976~~ To ~~September 10, 1976~~

Name of hospital Indiana University Hospital, Address 1100 West Michigan, Indianapolis, Indiana

Did disability result from employment? ☒ Yes ☐ No

If yes, give amount of benefit you are receiving from Workman's Compensation $90.00 weekly

Do you have disability insurance with other companies? ☐ Yes ☒ No. If yes, give names of companies and policy numbers:

Your doctors during the past year ▼	Sickness or Injury ▼	Date Consulted ▼
William Capello, M.D.	Injury	2/10/76 thru now

These statements are true and complete to the best of my knowledge. I authorize any insurer, physician, or hospital to disclose any information regarding my insurance coverage or medical history.

Date 3/30/77 Signature of Insured X Lloyd Hadley

Address of Insured 172 South Road 225 East, Danville, Indiana 46122
Street Town State Zip Code

STATEMENT OF GROUP POLICYHOLDER

Cert. # 13

Insured's Name Lloyd Hadley I.D. No. 311-22-3742 Unit or Div. No. 12

Insurance Class 1-B-70 Eff. Date of Insurance 6/29/64 Eff. Date of Last Change 7/1/76

Was Insured in your employ when disability began? ☒ Yes ☐ No Date Insured Entered Employment 12/1/61

Was insurance in force when disability began? ☒ Yes ☐ No Date Insured last worked 2/10/76

Is Insured's insurance still in force? ☒ Yes ☐ No If no, give date of termination

Has insured returned to work? ☐ Yes ☒ No If yes, give date he returned

Type of Benefit ☒ Monthly Income ☒ Weekly Income ☒ Waiver of Life Premium LTD-X

Insured's Salary: Weekly $ 292.00 or Monthly $ Amount of Benefit Claimed $ 70.00 ~~$ 126/week~~

Group Policyholder Indiana Statewide REC., Inc. Account No.

Date 3/30/77 By [signature] (Signature) Title Manager

...CASE (for INFORMATION): I hereby authorize the undersigned Physician to release any information acquired in the course of my examination or treatment.

SIGNED (PATIENT OR PARENT IF MINOR) Lloyd Hadley DATE 4/30/77

PART B — ATTENDING PHYSICIAN'S STATEMENT

1. **HISTORY**
   - (a) When did symptoms first appear or accident happen? .... Mo. 2 Day 10 19 76
   - (b) Date patient ceased work because of disability? ..... Mo. 2 Day 10 19 76
   - (c) Has patient ever had same or similar condition? ..... Yes ☐ No ☑ *If "Yes" state when and describe* ..
   - (d) Is condition due to injury or sickness arising out of patient's employment? Yes ☑ No ☐ Unknown ☐
   - (e) Names and addresses of other treating physicians .....

NATIONAL LABOR RELATIONS BOARD
Docket No. 8931 OFFICIAL EXHIBIT NO. GC-24
In the matter of
Date 5-12-77 Witness Reporter CC
No. Pages
Disposition: Identified ✓ Received ✓ Rejected

2. **DIAGNOSIS (including any complications)**
   - (a) Diagnosis (including any complications) stiff · (L) Knee
   - (b) Subjective symptoms .....
   - (c) Objective findings (including current X-rays, EKG's, Laboratory Data and any clinical findings)

3. **DATES OF TREATMENT**
   - (a) Date of first visit ..... Mo. 6 Day 19 19 76
   - (b) Date of last visit ..... Mo. 5 Day 10 19 77
   - (c) Frequency ..... Weekly ☐ Monthly ☐ Other (Specify) ☐

4. **NATURE OF TREATMENT (including Surgery and medications prescribed, if any)**
   6-19-76 surgery
   6-24-76 Sutures
   5-10-77 office visit

5. **PROGRESS**
   - (a) Has patient ..... Recovered? ☐ Improved? ☐ Unchanged? ☐ Retrogressed? ☐
   - (b) Is patient ..... Ambulatory? ☑ House confined? ☐ Bed confined? ☐ Hospital confined? ☐
   - (c) Has patient been hospital confined? Yes ☑ No ☐ If yes, give Name and Address of Hospital University Confined from ____ through ____

6. **CARDIAC (If Applicable)**
   - (a) Functional capacity (American Heart Ass'n.) ..... Class 1 (No limitation) ☐ Class 2 (Slight limitation) ☐ Class 3 (Marked limitation) ☐ Class 4 (Complete limitation) ☐
   - (b) Blood Pressure (last visit) ..... ____ / ____ SYSTOLIC / DIASTOLIC

7. **PROGNOSIS**

	PATIENT'S JOB	ANY OTHER WORK
(a) Is patient now totally disabled?	☑ Yes ☐ No	☐ Yes ☑ No
(b) What duties of patient's job is he/she incapable of performing?		
Do you expect a fundamental or marked change in the future?	☐ Yes ☑ No	☐ Yes ☐ No
(1) If yes, when will patient recover sufficiently to perform duties?	☐ ____ / ____ / ____ ☐ 1 mo. ☐ 3-6 mo. ☐ 1-3 mo. ☐ Never	☐ ____ / ____ / ____ ☐ 1 mo. ☐ 3-6 mo. ☐ 1-3 mo. ☐ Never
Remarks ____		
(2) If no, please explain		

Date 5-12-77 Signature

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE ADMINISTRATIVE LAW JUDGE— January 9, 1978

Mary Weatherman, Witness

DIRECT EXAMINATION

BY MR. HAYES:

* * * *

[6] Q And who all was present at that meeting?

A My husband, myself and Mr. Lydick.

Q Who arranged the meeting?

A My husband.

Q Why didn't you arrange the meeting, Mrs. Weatherman?

A Because I was afraid if Mr. Dillon found out that I had arranged the meeting that he would fire me.

* * * *

[13] JUDGE RIES: Why did you say that?

MS. WEATHERMAN: Because after the lawyer and Mr. Dillon had gotten together reports on Lloyd to take to present before the Board of Directors, when I got Board Meeting Minutes ready which we usually did on a Friday, I asked Mr. Dillon if he had other papers he wanted to go out with the Board Meeting Minutes to the Directors.

* * * *

[16] Q I believe you testified that you placed two phone calls to Lloyd Hadley on May 5th, 1977?

A Yes.

Q Was it as Mr. Dillon's secretary? Did you routinely place calls to Mr. Dillon?

A No, sir. Normally he placed his own calls.

Q Mrs. Weatherman, directing your attention to May 9th, 1977, what time did you report to work on that date?

A Eight o'clock.

Q Is that your normal starting time?

A Yes, sir.

Q What work task, chores did you perform on that date?

A Well, it's my duty to answer the phone. So, I took all phone calls that came in that morning, opened the mail, put the mail on Mr. Dillon's desk and then I typed the agenda for the board meeting and I believe I typed the roll call for the board meeting and I did some other clerical work for Mr. Dillon that morning.

* * * *

CROSS-EXAMINATION

BY MR. OBREMSKY:

* * * *

[23] Q Mrs. Weatherman, you indicated that you were employed by the REMC for approximately nine years, is that correct?

A That's correct.

Q How much of that time were you Mr. Dillon's personal secretary?

A I believe I became Mr. Dillon's secretary in January of 1973.

Q Now, will you describe for us, please, the office arrangement there at Hendricks County, REMC, where you sat and where Mr. Dillon sat?

A Yes. We shared an office with a petition [*sic*] between us.

Q All right. And your desk was on one side of the petition and his desk was on the other?

A Yes.

Q How high was the petition?

[24] A I would say it was about six feet.

Q It did not go to the ceiling in any event?

A No.

Q And there was an entranceway between the two of them so that you could walk from where his desk was to where your desk was, is that correct?

A Yes.

Q And you could hear conversations that took place in his office?

A Very seldom.

Q Pardon?

A Very seldom.

Q And he could hear conversations that took place in your office?

A I don't know what he could hear from my office.

Q All right. Any event when Mr. Dillon made phone calls you could hear what he talked about?

A Not usually.

Q What do you mean "not usually"?

A Because Mr. Dillon talked very low. The only conversations I would hear on his phone was if it was like a big complaint where he was angry with someone where he talked in a louder tone of voice.

* * * *

[25] Q Now, where were the personnel files of the respective employees kept?

A As far as I know there are no personnel files.

Q Well, how about the files that the insurance material [26] was kept in and all the records that the REMC had for each individual employee? Where were they kept?

A There are no records for each individual employee. I kept insurance records on the employees that did file insurance claims but only on the ones that filed insurance claims. There was no record for every employee.

Q And they were kept in your office?

A Yes.

Q And that was part of your responsibility as Mr. Dillon's secretary?

A Yes.

Q Now, did you type all of Mr. Dillon's letters?

A Yes.

Q How did he do that? Did he dictate them to you or did he write them out longhand and then you typed them?

A He wrote them in longhand or sometimes he would tell me what to write in a letter and from memory I typed the letter.

Q All right. He would just tell you generally what he needed and you would go ahead and type the letter up?

A Yes.

Q Did you handle his appointments?

A No, sir.

Q Did you keep an appointment book for him?

A Not as such. He did not tell me about his appointments. [27] The only way I could keep track of his appointments was from an Indiana statewide paper that was printed and from that paper I could tell when the meetings were.

JUDGE RIES: What sort of meetings are those? You mean board of directors meetings?

MS. WEATHERMAN: No. They were meetings that would be Indiana statewide for managers, managers meetings and such and usually the president of the board of directors.

JUDGE RIES: The only thing you knew about his appointments were what you read in the newspapers?

MS. WEATHERMAN: Yes. Mr. Dillon did not keep me informed of all of his appointments. If he was going to Pete's office he usually didn't tell me until he got ready to leave the office or maybe that morning. I didn't know, like a week ahead of time.

MR. HAYES: Your Honor, may I address the Court? I think it would be necessary on the record to clarify who Pete is.

MS. WEATHERMAN: Pete Obremskey, the attorney for REMC.

JUDGE RIES: All right.

BY MR. OBREMSKEY:

Q Now, with regard to the board minutes, was your responsibility to type the board of directors minutes?

A Yes. I typed the board minutes from a draft that came from your office.

[28] Q All right. And you also prepared the agenda for the board of directors?

A Yes.

Q That Mr. Dillon told you—

A Mr. Dillon wrote it out in longhand and I then typed the agenda.

Q All right. It was also your responsibility to send out notices of the board of directors meeting?

A Yes.

Q And from these minutes you determined that the board of directors was considering what it should do with Mr. Hadley?

A No, sir, it was not.

Q Oh. Where did you get this information?

A Lloyd and I were good friends and Lloyd had told me that he had not been contacted by any member of the board of directors or by Mr. Dillon and I asked Mr. Dillon at one time if he had ever been out to Lloyd's house to see what Lloyd could do as a productive employee and he said no, he had not. And I informed him at that time that he had rebuilt the transmission on my car and he also does beautiful woodwork.

Q You were aware, were you not, that the board of directors had appointed a committee to investigate what would be in the best interest of Mr. Hadley as a result of [29] his injury?

A Yes.

Q And when did you first become aware of that?

A That would have been from the board meeting minutes.

Q All right. And that would have been when?

A It was the March meeting. They were in the meeting.

Q Are you sure it was the March meeting?

A Well, I can't be certain, no, but I believe it was the March meeting that the committee was appointed to meet for the March meeting.

• • • •

Q Do you recognize those minutes as minutes that you typed for the February 8th, 1977 Board of Directors [30] Minutes?

A Yes, I would say I did. There is no initial on them but I would say that I did.

Q Okay. And do those minutes contain a reference to a committee being appointed concerning Mr. Hadley?

A Yes, they do.

* * * *

[31] Q Now, Mary Mae, in your job you were responsible for all insurance claims, were you not?

A Medical claims, yes. Medical insurance claims.

Q And you worked on these for all the employees?

A Yes.

Q And you worked in conjunction with Mr. Dillon in processing the forms and making sure that the employees received the proper insurance benefits?

A Yes.

* * * *

[32] Q Mr. Dillon was the principal operating officer of the REMC, is that correct?

A Yes. He was general manager.

Q And had general responsibility for all of the labor relations of all of the employees, Union employees as well as those in the office?

A Yes.

Q And did you write letters written by Mr. Dillon to myself and to others relating to the labor relations with the Labor Union?

A No, sir. The only time I would have written a letter to you would have been concerning that they were having a meeting or negotiations for such as to give you a date or something of this sort. But to my knowledge your office handled all correspondence to the Union people.

Q All right. And copies of that correspondence came to your office?

A I never saw copies of that.

Q All right. I thought you indicated you opened up all the mail.

A I did not open all mail. Some mail was pulled out before it ever crossed my desk and was given directly to Mr. Dillon.

Q Do you know who did that?

[33] A Mr. Douglas.

* * * *

[37] Q Were you aware that Mr. Lydick was chairman of the committee to investigate Mr. Hadley's accident?

A I didn't realize it until that night and he told us he was chairman on that committee.

Q Why did you pick out Mr. Lydick to go see?

A Because Mr. Lydick is the director of my and my husband's area.

* * * *

[39] Q And you were the one that was responsible for making sure that the insurance forms, et cetera, were properly handled?

A Yes, with Mr. Dillon's help.

* * * *

[46] Q You removed your personnal [*sic*] file?

A My personnal file.

Q And is that the same sort of personnal file that's kept for every REMC employee?

A Only if they have an insurance claim.

Q But it was the only file the REMC had on you as far as you know?

A I don't know about any other files. I only know about the insurance file that I kept and these files were set up by myself for my own personal help in determining a claim. When someone came in with a claim, if it

was a previous illness for a year you could use the same claim number. In the past, up until the time that I took care of these forms, they always threw this information away or gave it back to the employee. I set up the file for my own benefit because it was helpful to me. It wasn't something the company told me to set up or it wasn't something Mr. Dillon asked me to set up and at the end of the year these records were of no value to anybody because you had to fill out doctor's forms at the first of the year to establish new claim numbers.

JUDGE RIES: Did these contain strictly medical papers?

MS. WEATHERMAN: Yes. Just copies. When someone got a check back from the insurance company it was just a copy stating how much the check was with a claim number on it.

• • • •

REDIRECT EXAMINATION

BY MR. HAYES:

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[55] Q Mrs. Weatherman, while you were employed at the REMC did you participate or assist in handling grievances under the Union contract between the REMC and the outside employees?

A No, sir.

Q While you were employed at the REMC did you participate or assist in the negotiation of the existing Collective Bargaining Agreement between the outside [56] employees and the REMC?

A No, sir, I never did.

Q While you were an employee of the REMC did you participate or assist in decisions by management to discipline employees?

A No, sir.

Q How about decisions by management to reward employees if employees were ever rewarded for outstanding service or such?

A No, sir, I never did.

Q While you were an employee of the REMC did you participate or assist in the decision to hire or fire employees?

A No, sir.

JUDGE RIES: I would like to get some clarification of these verbs that you're using. "Assist," "participate in or assist." I take it you are including any possible clerical duties that she may have performed? Is that what you're including?

MR. HAYES: Your Honor, I would represent to the Court that, yes, she—I am not asking her if she participated in a decision as such but whether or not Mrs. Weatherman sat in, took notes, made notes to file, et cetera. And she said the clerical duties that would be necessary to record the labor policies or labor relations [57] between Mr. Dillon and his employees.

JUDGE RIES: Is that the way you understood his previous questions, along this line?

MS. WEATHERMAN: Yes.

MR. OBREMSKEY: Well, as I understand the question was asked: Did she assist or participate in the action itself.

JUDGE RIES: Yes, that's what it sounded like to me. I could see a case for saying that the witness understood she was not a policy maker and therefore she construed the question to refer only to the framework of her own type of duties.

MR. OBREMSKEY: Right.

JUDGE RIES: But I wanted to clarify that for the record and the witness says that that's the way she understood the question.

MR. OBREMSKEY: All right.

JUDGE RIES: So, I don't see any point in asking all of those questions again. So I think we can proceed.

BY MR. HAYES:

Q Mrs. Weatherman, while you were an employee of the REMC did you ever correspond or take corres-

pondence for Mr. Dillon that was intended to be sent to the National Labor Relations Board?

A No, sir.

[58] Q While you were an employee of the REMC, Mrs. Weatherman, were you actually physically present at any board meetings, REMC Board Meeting?

A No, sir.

Q While you were an employee of the REMC, Mrs. Weatherman, were you actually physically present during any possible management meetings excluding the board of directors? I'm referring now to Mr. Dillon, Mr. Douglas, Mr. Spencer and other line management people at the REMC.

A The only management meeting I ever attended was the one previous to the annual meeting.

Q What year are we talking about?

A There is an annual meeting each year. And I would sit in on that meeting just before the annual meeting for the purpose of getting together who was going to do what, who was going to set up chairs at the annual meeting, who was going to order sandwiches and so forth like this.

But as far as any management meetings, I never did.

Q Mrs. Weatherman, while you were an employee of the REMC did you ever type or handle interoffice memos with regard to labor policies?

A No, sir.

Q Do you take dictation?

A No, sir, I do not.

Q Was it a practice of Mr. Dillon's to have you take [59] or type memos regarding phone calls that he had received?

A No.

Q Was it a practice of Mr. Dillon's to have you place calls or contact members of the REMC Board of Directors for business purposes?

A No, sir, never for business.

Q You say never?

A Never for business. The only time he ever asked me to call the board of directors was if a board of director was in the hospital or a board of director had passed away, something to that effect, and he would ask me to notify each board of director.

Q Mrs. Weatherman, did you maintain payroll files as an employee of the REMC?

A No. I have nothing to do with payroll files.

Q Mrs. Weatherman, did there exist at the REMC while you were employed there a labor relations file as such?

A I never saw one.

Q Were you bonded while you were an employee of the REMC?

A No.

Q You testified a moment ago, Mrs. Weatherman, that you did not participate or assist in the handling of grievances between the outside employees under the Union contract.

[60] A Yes.

Q Are you aware of how those grievances were handled?

How they came to the attention of management?

A I believe there was a Union representative who probably talked to Mr. Spencer and Mr. Spencer, in turn, got with Mr. Dillon and then they set up a hearing in the conference room between the Union and management.

Q I believe you testified when Mr. Obremskey had you on the stand that you had some knowledge of labor relations matters. Is that a fair—

A No. I have never had anything to do with labor grievances or the Union.

Q Mrs. Weatherman, are you aware of whether or not the REMC has a labor relations attorney?

A It would be Mr. Obremskey if they have a labor relations attorney.

Q Are you aware, Mrs. Weatherman, of how Mr. Dillon would communicate with Mr. Obremskey concerning labor relations matters?

A Yes. He normally calls him on the phone.

• • • •

[64] QUESTIONS BY JUDGE RIES

Q On the day that this incident occurred with the forms relating to Mr. Hadley prior to the time that you were fired and you finally told Mr. Dillon that the original of that form that you thought had been sent to Lloyd was, in fact, enclosed in the file folder, what was his reaction at that point?

A Well, I think he thought I had intentionally held the form back for some reason.

• • • •

Wayne Spencer, Witness

DIRECT EXAMINATION

BY MR. OBREMSKY:

• • • •

[83] Q Now, who was responsible in the REMC for formulating [84] management policies with regard to labor relations?

A Wallie Dillon.

Q Who was the one that determined management policy concerning interpretations of the Labor Contract with the IBEW?

A Basically it could come through me first with the approval of Wallie Dillon. I would have to say that Wallie was.

Q Who would make the final decision?

A Wallie Dillon.

Q Who carried out and effectuated these management policies?

A Wallie Dillon or if he would ask me to then I would do so.

Q Now, in his absence on vacation or illness or whatever, who was responsible, then, for the day-to-day operation of the REMC?

A Basically I was to a certain degree.

Q All right. And what contact during those periods of time did you have with Mrs. Weatherman?

A I would have to contact Mary Mae for any policies or files that he might have, such as reports that we would have to the Public Service Commission. She would show me the forms and assist me in filling those out.

• • • •

[85] A She would assist me as far as bringing me up to date on the mail, the past mail that he had which I had no way of knowing from day to day operations what he would do with it.

She would assist me in that.

Q And how would she assist you?

A More or less determined the junk mail from every day procedure, what was important and what wasn't.

Q And how would she bring you up to date as to what was important?

A She would open the letters and bring them to my attention. Normally, we would go into his office and she would inform me on the proceedings of that mail as he, in the past, would distribute it.

• • • •

[86] Q During the time you were an acting manager of the REMC did she type your correspondence for you?

A Yes, she did.

Q What did she do for you during this period of time?

A She would make out the agendas, any reports that we had to make out that are every-day operation.

Q What sort of reports were those?

A They had reports that went to Stanley Consultants. We had reports monthly that went to the Public Service Commission. Various communications pertaining to the business.

Q Now, who are Stanley Consultants?

A Stanley Consultants are consulting engineers. Muscatine, Iowa; the engineer of the city.

Q During these periods of time did she open the mail for you?

A Basically she would open the mail that was directed back to that office.

• • • •

[88] Q How well versed was Mary Mae Weatherman in the management function that Mr. Dillon was performing?

A I think she knew his routine of business and particularly the people that we had negotiated with and delt with every day. I think she knew his procedures of handling that business and that's what we tried to—I tried to stay within that same procedure.

• • • •

Wallace E. Dillon, Witness

DIRECT EXAMINATION

BY MR. OBREMSKY:

• • • •

[96] Q What are your business duties and responsibilities as manager of the REMC?

A Well, I have the jurisdiction of all the operations of the REMC; then assisted by my staff people.

• • • •

[104] Q Any other files on your side of the desk pertaining to personnel particularly? On your side of the partition, rather.

A No, not pertaining to personnel. There were other files. Maybe I misunderstood the question.

There were other files, contracts, estimates on construction and etc.

Q All right. Bids received from other—Bids, were bids over there?

A Yes. And estimates.

Q Now, did the Board of Directors as a result of Lloyd Hadley's accident appoint a committee to investigate that matter?

A Yes, they did.

Q And did that committee prepare reports?

A Yes.

Q And what file were these reports kept in?

A It was kept at my desk. That report was given to me by Mr. Krebs and I kept it at my desk.

* * * *

[108] Q And on what side of the partition did you keep your file relating to labor negotiations?

A It was on my side of the partition behind my desk in the little, short drawer.

Q In regard to these labor negotiations, did you attend them?

A Yes.

Q And what function did you perform in the labor negotiations?

A Very little. I participated in the labor negotiations very little, other than if someone would request certain data I would usually secure it for them.

Q By that "someone" you mean whom?

A Well, you or the Board of Directors or the union representatives.

Q And where did you get that data from?

A I would usually have to get it from the files up in our front office. Right now that was files in the front or in the safe on pension programs, health insurance, and then possibly they were some in my file behind my desk.

Q All right. Now, when you are hiring employees, who interviews employees?

A Generally the staff person whose department is in need of a new employee, he'll interview the employee along with me.

[109] Q In your office?

A Well, usually we go to the conference room.

Q All right. And who fires employees?

A I have the responsibility and my staff people has that jurisdiction. Instead of responsibility, I have the jurisdiction and so do my staff people.

Q With regard to these labor relations, who formulates the management policy to carry out the labor management relations?

A The Board of Directors.

Q All right. And do they delegate responsibility to you in this regard?

A Yes, they do.

Q And what responsibility is that?

A They make the policies and they direct me to fulfill their responsibilities.

Q Do you have any function in interpreting the labor contracts and labor relations among employees?

A No.

MR. HAYES: Objection, Your Honor. He's leading the witness all over the place and General Counsel would like to make—

MR. OBREMSKEY: I'll strike the question if it's upsetting you to save a speech.

BY MR. OBREMSKEY:

[110] Q All right. What functions do you have in regard to the individual problems that may be created with people in the office, clerical force or the outside force?

A I'm sorry. I didn't catch that.

Q What function do you perform with regard to labor relations problems with the clerical people or with the outside people?

A Usually if there is any problems it is first taken up by my staff people, Mr. Spencer and Mr. Douglas.

If they cannot get them ironed out then they come to me and we jointly clear the situation.

Q And where do these conversations take place?

A Usually we go to the conference room because there is ample room there, seating capacity and tables.

* * * *

CROSS-EXAMINATION

BY MR. HAYES:

* * * *

[112] Q Now, you testified that you participated very little in labor negotiations, is that correct?

A That is true. I'll clarify that. I attended the meetings but I participated very little.

Q In the actual negotiations for the contract?

A Yes.

[113] Q Who did the main negotiating for the REMC for the union contract?

A Mr. Obremskey. And I may add, also Mr. Krebs.

Q The two lawyers?

A Yes.

Q Now, Mr. Krebs and Mr. Obremskey, let me get this straight, they are being retained by the Hendricks County REMC?

A Yes, that's true.

Q Okay. Now, not by you?

A No.

Q And you testified that the Board of Directors formulates the labor relations policies, isn't that true?

A Yes, that's true. Well, let me clarify it.

After negotiations then it is discussed at the board meetings. Then the board meetings of the Board of Directors either approve or disapprove all of the negotiations.

If they approve them then they are handed down to me to carry out.

Q Do you know what the word "formulate" means, Mr. Dillon?

A Well, I probably know. I don't know whether I do or not.

Q Somebody or some person has an idea of how they want things to be. Do you understand "formulate" to mean that?

A Yeah.

Q Let's put it this way, Mr. Dillon: Do you have a vote on [114] the Board of Directors?

A No, sir, I do not.

Q So, it's not correct to say that you make the labor policies at the REMC?

A No, sir, I do not.

Q I'm using the word "make" instead of "formulate."

A I do not. I understand them both to mean the same.

Q You do not, is that your answer?

A That is true.

Q You testified earlier, Mr. Dillon that Mary Mae Weatherman had access to the safe, isn't that right?

A Pardon?

Q You testified earlier that Mary Weatherman had access to the safe at the REMC?

A Yes.

Q Isn't it true that there is more than one safe?

A Yes, there is.

Q How many safes are there?

A We have one walk-in and two smaller safes.

Q Now, Mary Weatherman, of course, isn't the only one that has access to the safe?

A No, she is not.

Q What safe does she have access to?

A She had access to all of them.

Q Okay. To all of them. She's not the only clerical [115] employee that has access to all of the safes?

A No, she is not.

Q Mr. Dillon, if the Hendricks County REMC—It's more like a co-operative, isn't it?

A That's what it is.

Q Oh, it is? Okay. People work together?

A That's right.

Q And the clerical services are for the benefit of all, right?

A Clerical services are provided by the REMC for the benefit of all the members of the corporation.

Q So, you've got nothing to hide from the members of the corporation, do you?

A No, sir.

Q Why, then, Mr. Dillon, did you talk so much with Mr. Obremskey on direct examination about so-called private papers or secret papers?

A I didn't realize that I did talk about secret papers.

Q Or confidential papers.

A I didn't know as I—

Q Okay. So there aren't, there are really no secret papers as such?

A No.

Q No papers that would damage the REMC such as a secret classified document?

[116] A No.

MR. HAYES: Just a minute, Your Honor. I think I'm ready to finish up. I have to look at my notes here for a minute to make sure I haven't missed anything.

JUDGE RIES: Okay.

MR. HAYES: Bare with me one moment.

BY MR. HAYES:

Q I just want to make one thing perfectly clear, as the saying goes, Mr. Dillon.

The Hendricks County Board of Directors, of which body you do not have a vote, formulates or makes labor relations policies for the REMC, correct?

A Yes. They approve—

Q Just answer my question.

A They approve them after they're negotiated.

Q No, that wasn't the question.

A Okay.

Q The question was: Them come up with the ideas as to how they want their labor policies to be at the REMC?

A Yes, they do.

MR. HAYES: Okay. No further questions.

MR. OBREMSKEY: Your Honor, do you have a question?

JUDGE RIES: Go ahead. Maybe you'll get it answered.

REDIRECT EXAMINATION

BY MR. OBREMSKEY:

[117] Q All right. In labor negotiations, Mr. Dillon, you indicated that Mr. Krebs and I do the actual negotiating with the union, is that correct?

A That's true.

Q Now, are there other meetings outside of the presence of the Union?

A Yes.

Q And who is in those meetings?

A The executive board. They meet with you and Mr. Krebs and that is, they instruct you how to negotiate.

Q Are you present at those meetings?

A Yes, I am.

Q And is there a discussion among the members of that group?

A Yes.

Q There is? Regarding negotiating positions?

A Yes, there is.

Q What participation do you have in those cases?

A I have very little participation other than maybe possibly just answering a question.

Q All right. Now, after the Board establishes the labor policies who carries out the labor policies?

A You mean the contract after it's—

Q (Affirmative nod.)

A I, myself, and Mr. Spencer.

[118] Q Now, the way it goes, as I understand it, the negotiating committee negotiates with the union?

A Correct.

Q All right. And then what happens to the contract then?

A Okay. After the negotiations are completed it is all taken back to the full body of the Board. They ratify it. Then it is sent on to the union.

The agreement is put together. Then it's submitted to the employees for their ratification.

Q All right. And do those discussions regarding the labor contract show up on the minutes of the REMC?

A Yes, I'm sure that it does.

Q And the same minutes that Mary Mae Weatherman types?

A Yes, that's true.

Q You indicated that there were no confidential papers in the REMC, Mr. Dillon.

Would you have any objection to the union taking a look at the REMC negotiating statements during negotiations?

A No. Very definitely not.

Q What about Public Service Company of Indiana? Who are they?

A They are utility, a utility who supplies all of our power. We purchase all of our power from Public Service Company of Indiana.

JUDGE RIES: I don't know whether I understood that [119] question and answer. I think I misunderstood one of them.

You asked the question about the union having an objection.

MR. OBREMSKEY: Let's start all over again.

BY MR. OBREMSKEY:

Q All right. The REMC, does it establish its negotiating positions with the union in labor negotiations?

A Yes.

Q And are the status reports prepared relative to labor negotiations?

A Yes, they are.

Q And who prepares them?

A You and Mr. Krebs.

Q And are they sent to you?

A They are sent to the Executive Board. Yes, I do receive a copy of them or you present me a copy.

Q And are these the type of papers that the union, you would like to have the union get ahold of?

A Yes, I would say so. Yes.

Q You have no objection to the union getting all those status reports and labor negotiation positions?

A Yes. I would prior to our negotiations, yes.

Q I still don't understand you.

A Well, I don't understand you, either.

JUDGE RIES: Suppose the union got hold of those reports [120] you're talking about. Would you be a little peeved if they did?

MR. DILLON: I don't know as I would be peeved. It would just make—Maybe I'm not understanding you. Maybe it's the information that our Executive Board had met with Mr. Obremskey formulating as to how they had requested him to negotiate the contract, is that what you have reference to, sir?

JUDGE RIES: Well, would you object to it if the union saw that?

MR. DILLON: I wouldn't object but I would prefer that they not see it prior to our negotiations, if you put it that way. I'll be frank with you.

JUDGE RIES: How about when he sends you the status reports of how the negotiations are going? How would you feel about the union seeing those?

MR. DILLON: I don't think I would object because the status reports would have already been discussed at the meetings, at the negotiation meetings.

JUDGE RIES: Okay.

BY MR. OBREMSKEY:

Q How about reports on negotiating strategy? Would you object to the union getting ahold of that?

A That's what I thought we was talking about. That's my answer to him. As I say, that's what I have reference to or [121] that's the way I understood the question.

Q You wouldn't have any objection to the union getting ahold of the REMC negotiating strategy?

A Well, yes, I would. I mean prior to the negotiations, yes.

Q And you keep these matters in your labor negotiations file?

A Yes.

Q And where is that file kept?

A It is kept in the file behind my desk.

MR. OBREMSKEY: That's all I have.

QUESTIONS BY JUDGE RIES:

Q You mean those are parts of the minutes of meetings, is that how those documents are recorded?

A No, sir. I would say, no, they are not. They're just meetings, and what I have reference to, prior to negotiations with the labor union they will submit to us their proposals.

Q Yes.

A And then our Board of Directors meets, or our Executive Board, I should say, consisting of three people, meets with Mr. Obremskey and Mr. Krebs and they go through them and they negotiate or discuss the proposals and what we would propose.

Q And then Mr. Obremskey makes up a report on that, is that right?

A Yes. Yes, I would say he does, yes.

[122] Q And you're not sure about that?

A Yes, he does.

Q And then he sends it to the Executive Board with a copy to you?

A Yes, that is correct. Let me—I can't say whether he sends it to me. I think he usually carries it to me, and I'm not sure, I'm assuming he mails it to the Executive Board.

Q Oh. He usually carries it to you directly.

A Yes. Yes. I can't recall of him ever mailing me one.

Q And you put that in that little file next to your desk?

A Yes.

* * * *

Q And what else is in that file?
A Well, it's pertaining to the labor negotiations.
Q What else?
A Our contracts.
Q Contracts. What else?
A Make notes on what transpires at the labor negotiation meetings.
Q Your own notes on what happened?
A Yes.
Q Anything else?
A That's all I can think of at the present time.

• • • •

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE HEARING OFFICER—
January 8, 1979

Michael W. Maier, Witness

DIRECT EXAMINATION

• • • •

[12] Q (BY MR. MUELLER:) State and spell your name, please.
A My name is Michael W. Maier, M-a-i-e-r.
MR. MUELLER: Would you please mark these Employers's Exhibits 1 throught 3?

[The above referred to documents were marked Employer's Exhibit Nos. 1(a) through (i), 2(a) through (g), and 3 for identification.)

Q (BY MR. MUELLER): Mr. Maier, what is your present position with the company?
A I am President of the company.

• • • •

[14] Q What is the nature of your business?
A We manufacture some cooking appliances and heating—wood heating appliances. We buy and sell some refrigeration appliances, water heater appliances, we manufacture stampings and do painting, plating for other people. We call that in factory sales jobbing work and

we also make castings, both malleable and gray iron for other people.

Q Do you have an approximate—if you can, an exact number of the total number of employees employed by the company?

A There about 265 in the factory now.

Q I mean total. That is employed—total number. Don't break it down at this point.

A Probably about 450.

Q Now, you indicated you have a factory. How many employees are connected with the factory as such?

A About 265.

Q Do you have any other types of operations?

A Yes, we have a foundry.

Q How many employees are employed there?

A About 100 people in the foundry.

Q And the remaining—

A Office and managerial and supervisory. Those are approximate numbers, it varies.

• • • •

[40] Q Would you give us a brief description again of the types of products you manufacture generally indictating the nature or type of customer, also in a brief form whether it is your proprietary product or one you sell under your name or not. Do you understand what I am getting at?

A Well, you are talking about the appliance area and the [41] jobbing area.

Q And foundry.

A In the appliance area, there are certain products which are proprietary, that is we engineer them, design them, get them through the Underwriter's Laboratory and manufacture and market them. Some of these products are patentable in nature, some of the products are of such that we have to worry about competitors patents. Those products are developed by our technical people who work in what we call on Engineering Department.

Q Would you, by using 1(a), indicate which Section?

A That would be Technical Services under Mr. Jim Polzin.

Q As you go through, would you interrelate it with that Exhibit 1(a)?

A Now, those products are marketed by the people in the Consumer Product Marketing Section, Section II, under Mr. Jerry Barnes. These people are responsible for selling the product. They are responsible for servicing the product. They are responsible for shipping the product. They are responsible for advertising the product.

There are some products then which we purchase and sell through that same consumer product marketing group and again we are responsible for service, we are responsible for keeping them up in the field. The important thing in the area today is the fact that we also have a tremendous responsibility to [42] the consumer in the product liability area and the so-called service problems which are handled by the people who work under Mr. Jack Klein in Section II. It is the sort of thing that involves us in lawsuits and just horrendous numbers dollarwise, and so we have to—because of the Consumer Product Safety Act, we have to be very leary about product performance in the field.

There are other types of sales which we have under Section III and the sales there are brought in the foundry area and the factory jobbing area and those are relatively competitive fields. We have a lot of competition located in this area and prices which we charge for this sort of product has to be a well guarded secret because you can lose this business very easily. It is extremely competitive. The customers which we have in this area are a matter of—that list of customers is of prime importance. The same is true in the foundry area. Those people we call Section IV, but the sales for the foundry are handled under Section III, Mr. Colligan and Mr. Horst. Mr. Horst is the foundry sales manager.

Those areas, the billing for example, for products in jobbing sales is handled under Section VII, I believe. People that work in the Cost Department and with Mr. Ehlke and Mr. Sturner and Mr. Soldner.

* * * *

[47] Q I don't think this would be redundant from the explanation you gave before, but what I would like is for you to tell us what you understand the responsibilities of these eight sections to be.

A I will make it very brief. Technical Services designs products which we sell. They specify that product, they get it through various testing laboratories, they also write product specifications and do the layout work for a product which we make for other people.

Consumer Product Marketing sells and handles all the sales transactions on products which we manufacture and sell.

Jobbing Sales bids jobs and sells the products which we make for other people to their specifications.

The foundry people make the castings.

The factory people make the parts for our products and [48] products for other people.

The Section VI, the Purchasing people buy the parts which we have to buy to put into the products.

The Controller handles the costing and financial statements under Section VII.

The Secretary-Treasurer handles the personnel things. The private payroll transactions with the banks as far as lending and borrowing money and accounts payable and accounts receivable.

Q With regard to your answers for consumer products as it relates to selling products, you said those are products that you manufacture for others or for yourself?

A For ourselves.

Q And then the Jobbing Section is selling products that you manufacture according to specifications of other people?

A That is right. That is a very distinct difference there.

Q And would you briefly explain that?

A Well, for example, if somebody came to us and said we want you to develop an oven that we want to sell and we are to develop the oven and do the development work. That would cover over Consumer Product Marketing. There is a lot of difference in product liability. We are

performing a service. In the other case we make the product and develop it and sell it.

Q Does Section I have sole responsibility for the develop- [49] ment of products that you are talking about and I mean both types of products?

A Section I develops the products but they also do service work for the jobbing sales people and their Drafting Department does layout work which goes into the Model Shop and the people in the IBEW develop the templates for production. They develop the routing sheet for job specifications.

Q In Section I, is there—do those individuals that work in Section I have access to any type of information which is not generally available to the public?

A Any new product which we are developing and bringing to the market place, they are instrumental in bringing that along. If it is patentable we try to keep that secret or quiet until such time as we can get a patent application in and they do it, all the test work for that product until we get it through any laboratory that we have to get it through, whether it is the Underwriting Laboratory or something like that.

Q Now, that type of information that you described, who under 1(b)—would all the employees or individuals listed on 1(b) have access to that type of information, and if not, say which ones.

A The people in the Drafting Department would, Mr. Kaiser works on that type of product. So does Mr. Polzin. Mr. Negarkar does, Mr. Murphy might also and he does the product [50] specification writing.

Q In regard to Section I, do the individuals that are assigned to that area or that section have access to information that is not generally available to other employees of your company?

A Well, they have access to the drawings, they have access to the performance tests. We generally don't make that information available to other people.

• • • •

[51] HEARING OFFICER: Let me ask Mr. Maier which of the technical employees in the Section I unit do you believe are confidential employees?

* * * *

THE WITNESS: That is what I have been trying to tell you. Mr. Herbst, Mr. Lehmann, Mr. Lessard, Mr. Kostolni, draw plans up for products, some of which we have patented and for products which we develop. Mr. Kaiser tests that product. [52] He also knows how that product performs. He goes to Underwriting Laboratories for us and this is very confidential information.

* * * *

[60] Q (BY MR. MUELLER:) So the record is complete, Mr. Maier, as President you have direct responsibility to the performance of those on 1(a), to these sections on 1(a)?

A I do.

Q And each one reports directly to you?

A Yes.

* * * *

Q (BY MR. MUELLER:) Within Section II, do individuals within that section without regard to being concerned as to any one individual as opposed to another have access to information that is not available to other employees of the company?

A Well, a lot of these people have information relative to who our customers are. You are talking about—

Q Identify which people you are talking about.

A Pfingsten—I will try to restrict myself to people in question.

Q The purpose of my question—don't restrict yourself—

[61] A Pfingsten, Burbach, Noordhof and Yelk. And I would say possibly Christopherson, Margaret Schmitt, Holloway, and L. Kuzniewicz.

HEARING OFFICER: Is it your testimony that other employees—generally employees do not have knowledge of who the customers are?

A That is right. For example, somebody in other areas of Section III wouldn't know who the appliance dealers are. They would have no reason to know that.

Q (BY MR. MUELLER:) What significance does knowledge of appliance dealers have as it may relate to the overall operation of your business?

A The appliance dealer and appliance jobber in the appliance business are the life blood of the business.

Q Why is that?

A Because they are the people you sell to and if somebody gets that list and concentrates on these people, they can put you out of business.

Q How would they do that?

A If somebody got into the furnace area, if somebody got the names of your best distributors, we wouldn't sell our furnaces because we would lose our market. We are talking about survival.

Q Who has access to that kind of information within Section II?

[62] A Margaret Schmitt, Holloway, Mr. Burbach, Mr. Pfingsten has some of those. I would say Mr. Christopherson would have that information in advertising.

Q In addition to customer lists, is there any other type of information which is crucial to the operation of your business in a confidential nature?

A Well, cost information, of course.

Q And cost information would be within Section VII, Mr. Ehlke?

A Yes.

Q What type of cost information?

A Production cost. Product cost, not only in the appliance area but also the jobbing area because if a —if somebody wants to take a foundry job away, all

they have to know is what it costs and they can underbid you and the job is gone.

HEARING OFFICER: Mr. Maier, return to Section VII. Can you tell me if Mr. Knoll, Wendt, Wendlandt, Soldner, Kuehn, have that type of information?

A Mr. Soldner does. I suppose Mr. Wendlandt can get that information by the computer printouts that come out. I don't know whether Anderson could or not. She runs the machine and probably could.

Q (BY MR. MUELLER:) Again the question has occurred to me as you were testifying, is to briefly describe the extent of the market within which you operate. [63] A We sell appliances in most of the states except Alaska and Hawaii. We sell castings in the central states which is Minnesota, Iowa, Illinois, Indiana, Kentucky and a little bit in Michigan. We sell stampings in Wisconsin, Minnesota, Iowa, Illinois, Ohio and probably none in Michigan.

Q Any other type of information which you think is crucial to the operation of your company?

A I could make a comment when I talk about—we are leary of customer lists. We have done work for other metal stamping houses in this area who are our competitors.

Q Could you give an example of that?

A Well, Mayville. When their blueprints come into our plant the corners with their customer name is cut off so we don't know the name of their customer. It is really important in this business.

Q Why is that?

A Because if we know who the customer is we might call and say we are making this for Mayville, why don't you buy from us. So the people keep that information.

HEARING OFFICER: I would like to ask a question. Does the competition come then because of confidential information from customers rather than product differentiation. Is it their competition—in other words, even if

your customer list got out couldn't you maintain business by selling superior products?

[64] THE WITNESS: There is a lack of product differentiation in the marketplace in certain areas and that is why patents are important and that it why customer lists are important. A good share of the success of a product is not just development of the product, but it's marketability and the people you market with. We developed a product we call Add-A-Furnace. We sell to fireplace dealers, distributors; we don't sell them worth a hoot but the people who sell the product in big volume are the people in heating and ventilating business and that's why we have been successful in that area.

Q (BY MR. MUELLER): Together with other testimony you had given, you consider the identity of those—that type of entity confidential?

A Absolutely.

Q How do you describe that type of distribution?

A We call that a distributor type of distribution and that's a heating and ventilating type.

Q And that's synonymous with—

A A customer list.

HEARING OFFICER: Mr. Mueller, can we ask if there are any other employees who have confidential information and finish up?

MR. LUKER: Alleged confidential information.

MR. MUELLER: I have been trying to paraphrase it in that sense.

[65] Q (BY MR. MUELLER:) I think I was asking that type of question. Is there any other type of information which you consider crucial?

A Well, the people—

Q To the operation of your business which you consider to be of a confidential nature and you don't, as a matter of policy, do not want to share it with your other employees, whoever they may be?

A People in our Credit Department have that information.

HEARING OFFICER: Who might that be on Exhibit No. 5?

Q (BY MR. MUELLER:) What section is that?

A Section VIII.

Q You designate that as credit type information?

A That's right. They work off the list of accounts.

Q Can you just briefly expand as you did with the others?

A Every account has their credit checked so these people have to use that information to determine whether or not they are a good credit risk and try to deal with them and try to collect money which they may owe us.

Q Is that a responsibility—looking at 1(i), which is Section VIII, is that the type of information that all those employees have access to?

A Hupke and Krause—

HEARING OFFICER: In Section VIII, only Mr. Hupke and Mr. Krause are in issue?

[66] MR. MUELLER: Hupke is a woman.

HEARING OFFICER: Sorry.

THE WITNESS: I would feel that Mr. Paris would have to testify as to Agnes Hupke.

• • • •

[86] EARL EHLKE

was called for examination by and on behalf of the Employer, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

• • • •

Q (By Mr. Mueller) What is your present position with the Company, Mr. Ehlke?

A I'm Controller of the Malleable Iron Range Company, directly responsible to the President.

• • • •

[106] Q With regard to the department within your section labeled EDP Services, would you describe the functions of that department?

A Well, that's computer area and they generally pick up off from documentation and key punch information which is injected into the computer; the computer having been programmed to run management-type reporting. And, they in turn do just that, they will function in producing not only reports but they will produce shop payroll checks; they will produce accounts payable checks; keep track of receivables. Many of the accounting functions are done in addition to running management-type reports.

Q Describe what you mean by "management-type reports"?

A Well, we could have—An example of a management-type report would be a sales costing analysis which comes off the [107] computer which tells by product line what the sales/dollars were that were received for that product, the cost and what the margins were; confidential type of information.

Q Anything else included within management-type reports?

A There would be production type of reports on where the product is in the plant. Other sales type of analysis that are made off of the computer. There are many reports that come off, I just can't think of any individual ones presently.

Q Mr. L. Wendt—Excuse me, Wendlandt, would you describe the nature, functions and responsibilities of the job that he performs?

A Mr. Wendlandt is the Assisting Manager in this section. Mr. Wendlandt will function in the absence of the manager, Mr. Hinkes; he is the Assisting Manager. He's responsible for reports that I've indicated: The inputting of the computer and everything that comes out of this area when Mr. Hinkes is not here. Now currently—Incidently he was placed Assistant in this de-

partment in June of '72, shortly after I came with the company. His additional functions—

MR. LUKER: May I interject something here. I think that the Union stipulated and we have no intention of withdrawing our stipulations by the way that this individual is a supervisor, at least my records so indicate. Maybe a quick review of the record may do it, because if that [108] stipulation is in fact true, I think it would be a waste of time to take testimony.

HEARING OFFICER: I have Mr. Wendlandt still in question.

MR. LUKER: Unless I made the mistake, since I seem to be in the minority I would assume that I made the mistake and go ahead with your questioning.

MR. MUELLER: My notes show that you desired evidence on him. Your statements, Mr. Luker, would indicate that you still want evidence on Mr. Wendlandt?

MR. LUKER: Although my records do show that we stipulated this individual as a supervisor, I now doubt those records. I think we should have testimony on that to clarify the issue.

Q (By Mr. Mueller) Mr. Ehlke, I believe you were mentioning that he assumed the responsibilities as Assistant Manager, will you again tell us when that was in point and time?

A Approximately June of 1972.

Q '72?

A '72.

Q Were you responsible for that?

A Yes, I was, about the same time I came with the company and took over the responsibility of this area.

Q What were the reasons for the promotion and what was [109] he doing before that?

A He was doing programming, I think; and, he still continues to function in that capacity also. However, to properly organize this particular department and to keep the function of the department going smoothly, it is my suggestion he be made Assistant Manager within the

area. He was to understudy much of what Mr. Hinkes was doing and was given an increase in salary along with his promotion at that time.

Q By the way, you just reminded me of a question that relates back to Miss Knoll. When she was promoted, did that also carry with it an increase in salary?

A Yes, it did.

Q Going back to Mr. Wendlandt, how is it that his being Assistant Manager makes the department run more smoothly?

A He would be responsible for the organization of work through the department. For instance, at month end there is a sequence of steps that must be gone through in terms of the computer to properly feed information into our monthly closing so that we can produce our annual statements within a reasonable length of time. The same would be true of the key punch operator. If their work was not directed, there could be a problem as to when the payrolls came off, whether they came off on the current Thursday or not. So, the work has to be directed and in Mr. Hinkes' absence, he will direct [110] it. Now, there is one other point that I would make in terms of Mr. Wendlandt at this time if I might in my testimony. Since we have made the decision to go to the Xerox computer service people in California with our data processing work, our manager in that department is deeply tied up and engrossed with getting the changeover made, so that he has turned the current computer operation, as we have known it, entirely over to Mr. Wendlandt. It's Mr. Wendlandt's responsibility to keep it going on a day-to-day basis. The month end and everything.

Q How long has he been doing that as a result of that?

A Approximately two months now I think he has had that responsibility.

Q Prior to the responsibility on a day-to-day basis to run the department because of the commitment to the changeover to Xerox—prior to that time—did the other

employees listed below Mr. Wendlandt on 1(h) look to him for assignments as to their activities and jobs that were to be performed?

A Prior to what date?

Q Prior to the time that Mr. Hinkes became involved with the Xerox matter?

A Certainly in his absence he acted as assistant in the department, they would look to him for that direction.

[111] Q Say Mr. Hinkes would be there prior to this time, would these other employees below Mr. Wendlandt look to Mr. Wendlandt, look to him for their day-to-day work assignments?

A Not if Mr. Hinkes would be there.

Q L. Anderson, is that a female or male?

A That's a female, Mrs. Anderson.

Q Would you describe Mrs. Anderson's job responsibilities?

A As indicated, she operates the computer. She takes the programs and injects the program into the computer. She takes the key punched information from the operators and puts that into the computer. She in turn produces either the management-type reports or type reports or the accounting instrument, checks invoices, what have you.

Q Are you saying that she has access to the information contained within those typed reports then?

A Oh, yes.

Q Is this information confidential in the sense of it being of a business nature at least confidential as it relates to the public?

A We certainly wouldn't want it to go public, no.

Q Would the same hold true in regard to confidentiality as it relates to other employees? I'm talking about the information within these management-type reports?

A Yes, that would be true.

Q And, why?

[112] Simply because profit type of reporting information of that nature is not something that we disseminate

among all the employees. We keep that within our own financial area.

Q Mrs. Anderson has access to that type of information?

A She does. She produces it off the computer.

Q Does the same apply to Mr. Wendlandt?

A Yes, he would have access to it.

Q Does the same apply to either Mr. Bates or should I say Mrs.?

A Mrs. Bates.

Q Miss Kurtz?

A No, neither of those apply.

Q Does Mrs. Anderson have access to any information that would be of a confidential type that relate to or is in the nature of labor relation policies?

A No.

Q Does that same answer apply to Mr. Wendlandt?

A Yes, same answer applies.

Q I'd like to note that in trying to transpose for instance information from Employer's Exhibit 2 to our exhibit, that I don't have apparently—I don't have Mrs. Bates listed on Exhibit 2 unless someone can correct me as to that.

HEARING OFFICER: Off the record.

(Discussion held off the record.)

[113] MR. MUELLER: With regard to J. Bates, in my observation that individual did not cross reference between Exhibit 1 and 2. We would add that individual as a number 32 on Exhibit 2(f) for purposes of being complete so that number 32 would be Bates J., section would be Controller VII, Department EDP, Job Title, Key Punch Operator.

HEARING OFFICER: Mr. Ehlke, what is EDP?

THE WITNESS: Electronic Data Processing.

MR. MUELLER: And, that individual Bates would fall within the previous stipulation we entered into relative to clerical employees and Exhibit 2(f) as far as the company is concerned.

HEARING OFFICER: Mr. Luker?

MR. LUKER: That's fine.

Q (By Mr. Mueller) Would you, Mr. Ehlke, for the record describe what is meant by sales costing analysis type report; what does it include, that type of thing? What does it mean, what is it?

A Well, the report would cover several areas. It would cover our appliance and product area. It would cover what we call our outside fabrication or fabrication for other customers area. It would cover our foundry area. Now, generally, the report will show in the case of the appliance area, it would show the appliance model, the number of units sold, the sales price of those units, and the cost components, such as material, labor and overhead, total cost and total [114] margin or total of gross profit on that item. The programs also develop a—Well, it will develop a percentage margin on each of the various models that are sold so that in the case of appliances, it will go down model by model by model showing the accumulation of those sales and cost factors and margin on each of those models. In the case of the fabrication or the outside fabricating area, the report is put together by customer part number, sales costs, gross profit and margin. Same would be true in the foundry.

Q Is that information—Excuse me. Does Mrs. Anderson have access to that information?

A Yes, she does. She produces those reports.

Q Does the same hold true for Mr. Wendlandt?

A Yes, it does.

Q Does the same hold true for either Bates or Kurtz?

A No, it does not.

Q Is that type of information just described considered by you to be confidential information, that of management type?

A Confidential to what extent?

Q Well, do you consider confidential information that management wants to be kept within management circles—

A Absolutely, that's true.

Q Why do you say that?

A Again, I wouldn't disseminate information of that [115] nature showing margins and gross profits and sales volumes and costs to the rest of the employees that are outside of that area.

Q The same would hold true to the public?

A The public as well.

Q I want to go through the same type of testimony with regard to what you describe as production type inputs so if you remember what I just asked you can pick it up from there or I can start you off with a question. In other words, what are they, what's included thereon?

A The production reports—and I think you have reference to those reports—control the movement of materials through the stop indicating the work centers in which they are located, et cetera. What specific question do you have in regard to that?

Q Let me note this with regard to my question in specifying what you meant by management-type reporting. My notes reflect you stated that production-type reports are such; are my notes accurate in that regard?

A In terms of confidentiality?

Q No, in terms of a management-type report being a production-type report or vice versa?

A Yes.

Q What is a production-type report?

A Well, as I indicated it indicates where things are [116] within the shop area.

Q Is that confidential-type information?

A Yes, it is to the extent that we may decide to move things around within the shop area through the production schedule.

Q It relates to the total operation of the factory or foundry?

A Yes.

Q Does Mrs. Anderson have access to that?

A Yes.

Q Mr. Wendlandt?

A Yes.

Q Bates or Kurtz?

A Neither Bates nor Kurtz.

Q Is the information on this production-type reports significant with regard to the operation of either the plant or foundry as it relates to management?

A Yes, it is.

Q And, in what way?

A Well, it's crucial to again to the movement of orders through the shop to that extent, and to the extent that management has the prerogative to move those around to one spot or another or to completion of orders to the satisfaction of customers. To that extent it's important.

Q Okay. We will now direct our attention to the Cost [117] Department, describe what the purpose or job function of that department is?

A They cost the product, they collect data within departments as to the overhead burdens that each of the departments within the shops—both factory and foundry—operate under. They arrive at burden percentages which are applied to product. They furnish costing information to the cumputer to produce the summary that we previously talked about. Generally, like all cost departments, they cost our product and determine whether we made a profit or a loss on it.

Q Describe the job responsibilities of D. Soldner?

A D. Soldner is Assistant to C. Sturner, who manages the department. Again, he functions in the absence of C. Sturner and carries out the responsibility of the department during his absence. He also is responsible in the estimating area for working up estimates for possible future work.

Q Does that estimating have anything to do with pricing?

A It's the basis on which all the prices are set.

MR. LUKER: Excuse me for just a moment. Once again the Union's records reflect that we did stipulate that Mr. Sturner is in fact a supervisor.

HEARING OFFICER: He's getting testimony on D. Soldner who works under Mr. Sturner.

MR. LUKER: I'm sorry.

[118] MR. MUELLER: The Hearing Officer's statement is correct.

Q (By Mr. Mueller) You were stating that estimating has something to do with pricing?

A That's correct.

Q And, in what way or regard?

A There is certain profit percentages which are applied to those cost tests as they are developed in that man's area.

Q Is that information considered by you to be confidential in terms of management policy as it relates to other employees and/or the public?

A Public and also other employees outside of the financial area.

Q And, why?

A Well, again it is company policy that we would not want that information available to people other than those that work on it. Simply, we wouldn't want to run the risk of having that pricing escape to our competitors.

Q Is that same type of information relating to estimating and pricing that Mr. Soldner has access to also available to L. Kuehn?

A L. Kuehn assists in terms of clerical effort in the area but to my knowledge does not see the completed costing price picture, the total picture.

Q Mr. Soldner is a male?

[119] A Yes.

Q Does Mr. Soldner have complete access to the final costing pricing report?

A Yes. As a matter of fact, he would list the suggested price on there to the sales department.

Q Does he exercise any kind of independent judgment with regard to that data in terms of the suggestions to the sales department?

A Profit—As I stated, the profit percentages are fairly well established and set by me which are applied by the gathering of the costing information. There could be certain discretion as to how that was put together.

Q And, Mr. Soldner would exercise that?

A Mr. Soldner would exercise that.

Q By exercising that responsibility, is he affecting management policy in your estimation?

A He would to the extent that profits would be affected.

* * * *

[122] Q This costing and information as it relates to a bid, that's in the process of being made? Is that the type of information that management desires to be privy only to management?

A Yes.

Q And, why?

A Again, it's only good policy that you don't make that information generally known to everybody in the organization for fear of your pricing leaking out to your competitors or be known to your competition.

* * * *

[307] MR. MUELLER: The Company calls Mr. Polzin. Whereupon,

[308] JAMES POLZIN

was called for examination by and on behalf of the Company, and, being first duly sworn, was examined and testified as follows:

HEARING OFFICER: Please state your name for the record and spell your last name.

THE WITNESS: James J. Polzin, P-o-l-z-i-n.

DIRECT EXAMINATION

Q (By Mr. Mueller) What is your present position with the company?

A I'm chief engineer of Research and Development.

* * * *

[331] Q Do any of the people within your section have access to information which you believe is confidential to either the employees and/or the public, such as information being of a business nature?

A Yes, sir.

Q And, would you give an example of that type of information?

A We are a research and development organization, so it would be information on products that are either being developed as well as products that conceivably could be patented or are patentable.

Q Any other examples that you can give of this type of information you considered confidential?

A Yes, sir. All of the engineering people are aware of what the cost is to manufacture products, and they do work [332] with the costing aspect of the corporation.

Q Why is that type of information, costing information, confidential?

A I would say it would be from a standpoint that it could be used against the corporation during labor negotiations.

Q How?

A By the Union people if they knew what our costs were on a particular product. It would be—It might even be possible to somewhat accurately determine how much a division is making if you knew what the cost of the appliances were and the number sold.

Q Would it also relate to competition?

A Yes, sir, it could.

Q And, what—In what way?

A Competition would know or could know what a particular product is costing us to manufacture. It could

conceivably set their price accordingly in the marketplace.

* * * *

[474] MR. MUELLER: Company calls Mr. Klein as their next witness.

JOHN PHILLIP KLEIN

was called for examination by and on behalf of the Employer, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Mueller) Would you state your full name for the record, please?

A John Phillip Klein.

Q You are referred to as Jack?

A I'm always referred to as Jack.

Q Your present position with the company?

A Director of Distribution, Traffic and Product Service.

* * * *

[487] Q When Miss Kuzniewicz receives customer complaints, does she have the authority to make decisions as to adjusting those complaints or resolving those complaints?

[488] A Yes.

Q Without consulting you?

A Yes.

Q What portion of her job in terms of percentages would be devoted to that type of activity, namely customer complaints?

A 60 to 70 percent.

Q Does she have access to any type of information that is of a business nature that you would consider to be confidential to either the public and/or other employees of the company?

A Yes.

Q Would you describe that?

A All shipments that leave our plant each day we tally dollar and centswise. All shipments that leave our warehouses each day is tallied, added up and added to this figure. That information is inputed to me by S. Holloway, L. Kuzniewicz and by S. Schmitt. All three have that information at their finger tips. I would consider that harmful because any time a competitor can learn how you're doing dollarwise, it would be a great help to him in damaging our reputation.

Q I'm going to identify her as Jean. Does Jean have access to any information of a business nature that you consider confidential that would not be available to either [489] Holloway or Schmitt?

A Yes.

Q What information would that be?

A Any information pertaining to a possible or an actual lawsuit for whatever reason, she would have all that information.

Q What information would that be?

A For example, we have word that some client burnt themselves badly for whatever reason. She might very possibly have that information before I do. She would then gather all documentation on it. This just happened yesterday for instance, that's why it's fresh in my mind. And, once I contact the consumer and the dealer and the salesman involved, then she in turn takes that documentation, makes copies of it and turns it over to Mr. Ehlke who is our liaison man with our insurance company. I would consider that confidential in the nature that normally M. Schmitt or S. Holloway would normally not be involved.

Q Any other type of information?

A I'm certain there is, I can't think right off the top of my head.

Q Maybe that gives me an opportunity in which to ask that we go off the record briefly. I have a phone call that I have to make to my office.

HEARING OFFICER: We'll go off the record.

[490] (A break was taken.)

(Meeting reconvened.)

Q (By Mr. Mueller) Mr. Klein, I was asking you questions relative—which were a follow up on this confidential information and asking whether there was any other type of information of a business nature that you consider confidential that Jean would have access to that would not be obtainable to Mr. Schmitt or S. Holloway?

A I remember that I stated before that all credits that are issued are processed by my department and they all go through my desk but they go through Jean's basically and initially. By "credit", I'm referring specifically to price adjustment on products, I'm referring to reimbursement for returned goods; I'm referring to stock transfers. And, we do keep a hand tally of how many credits we issue, the amount of money we are giving away literally, which I would consider to be a very confidential factor bit of information that again would be harmful to us.

Q Why is it harmful and how could it be considered confidential?

A Very logically because the bulk of the credits are written on the identical part that indicates that that particular part was a terrible weakness in our product; and, it doesn't take much imagination to see the continual [491] repetitious of issuance of credits for the same part over and over again that you have problems. Our competitors would delight to have any of this data because it helps them see why their product is made better than ours.

Q And, she has access to that?

A Yes.

Q Same as you do?

A Same as I do. Just a short time ago, Jean actually kept a running log not only on the total dollar amount of credits we were issuing but particularly what we

were issuing credit on. But, there is no way that you can control the quality of the product unless you know what is going wrong. We were logging that, we did that for a year and a half and we in turn reported it to Mr. Barnes, the amount of credits, what the credits were being issued on and why, and we had product redesign.

Q Was that a product of information out of your department?

A Yes.

Q Only your department from within this whole section?

A Yes, it was only from within the appliance division. I have no knowledge of what is defective or what isn't in parts we fabricate for other vendors, I don't know.

Q Does your department, namely Distribution, Traffic and Product Service, have access to dealership lists?

[492] A We not only have access, we have them period.

Q Who within your department besides yourself have access to that?

A M. Schmitt and L. Kuzniewicz; without them we are helpless.

Q Would you consider that type of information of a confidential nature?

A Yes.

Q Why?

A One of the hardest things to do when you bring a new product on the market is: who are you going to sell it to? And, it's not easy to obtain market research of data as to who might be conducive to buying a product on a national basis. We have all of that information wrapped up in one little book, and that is an invaluable price-list tool for anyone that wants to compete with us.

Q By access to that book which has that information, do they have access to it because of the performance of their job?

A Yes.

Q Are you familiar with the work of Mr. Pfingsten?

A Yes.

Q Do I pronounce that right?

A Yes, good.

Q Would you describe his job content, responsibilities, [493] and the like?

A His job basically is to obtain information as to what particular dealers are interested in our product in an area that is not covered by either salesmen of our own employe or our agents. Give you a specific example: Texas, if we received inquiries of dealers in Texas that would like to buy our product, we would not send a man out there. Bill would get on our watts phone and phone them and make their acquaintance over the phone—sight unseen—and possibly open up an account. Then after proper credit investigation has taken place with approval from Mr. Barnes, we might ship that particular dealer in Texas X number of our product. Then, what he does, he follows up: Did the product arrive safely? Were there any problems? Then, he follows up and asks for a reorder—a replacement order. And, he follows up too and say, "Is there anybody else in your area that might be interested in our product that might be a competitor that we won't hurt you with?" This is spreading like an octupus. We have done that in California and the deep South, and not one has ever been made by a personal call or a physical call of a salesman or agent.

* * * *

[495] Q Does he have access to any information that you consider of a confidential nature to either employees or the public?

A To the extent only that we would know what the sales volume is in the particular areas that he's covering with his watts phone.

Q How about the dealership networks that he's establishing?

A That's what I said, the areas that he has specifically [496] covered, he certainly would be privied to all

sales in those areas as well as all problems because he has to feed them by phone.

Q Is the identity of the sources of distribution of a confidential nature? I'm thinking of a specific dealer or dealers as they develop?

A Once again, we have had competitors try the same program. Whirlpool is an example and unless you have access to know what dealers you can sell under this type of program, of course, the program will fail. Our program has been reasonably successful, in fact it was very successful for quite a period of time when the market was bad.

• • • •

[517] DONALD J. DOHMANN

was called for examination by and on behalf of the Employer, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Mueller) State your full name for the record, please?

A Donald J. Dohmann.

Q Will you spell your last name?

A D-o-h-m-a-n-n.

Q M or N?

A Two N's.

Q Your present position?

A Advertising Manager.

• • • •

CROSS EXAMINATION

[By Mr. Luker:]

• • • •

[535] Q You testified that Mr. Christopherson receives a lot of phone calls from people regarding your merchandise after they have seen an advertisement; and, I believe, you testified that he may refer them to a dealer in their area; does he have a list of dealers in geographical areas? If I would call from Chicago, he

would look up and say, "Yes, there is one at such and such a street, go and see him"?

A Yes, we have that in my office.

• • • •

[566] WALTER PARIS

was called for examination by and on behalf of the Employer, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Mueller) State your full name for the record, please?

A Walter R. Paris.

Q What is your present position with the company?

A Vice President, Treasurer/Secretary.

• • • •

[568] Q Who are Mr.—Is that a Mr. or female, M. Schwantes?

A Maryann, female.

Q What are Maryann's responsibilities?

[569] A Basically, she prepares the accounts payable paper work for submission to data processing. She acts as an assistant to Angus Hupke in Angus Hupke's absence; she does most of the duties of Angus Hupke.

Q And, what would be entailed by your description of her being an assistant to Angus Hupke? What does that entail as assistant?

A Well, they work together on accounts payable. In other words, we try to have what work Maryann prepares before data processing Angus Hupke will check over after data processing.

Q What are the job responsibilities of D. Krause; and, is that a female or male?

A Den[n]is Krause, male.

Q What are his job responsibilities?

A His job responsibilities are to assist Mr. Schwoch and specifically regularly peruses the accounts receivable ledgers to determine who should be written to, who should be phoned as far as delinquent accounts are concerned. He's also responsible for all security interests that we place on merchandise sold to various dealers. Generally, that covers quite a bit there.

Q What is the function of the Credit Department as it relates to your section; would you describe that, please?

A The Credit Department initially has to approve all new [570] orders or orders from customers whose credit has not been previously established. Once that approval is given, the order is released for normal processing. Then, the Credit Department follows up on these receivables as they become receivables to see to it that they are paid promptly.

* * * *

[571] Can I add one more duty that Mr. Krause has?

Q Yes.

A Mr. Krause has complete charge of the cash. Now, our cash comes into the company in two ways. Some cash or checks are mailed directly here to Beaver Dam in which case he physically matches the payments with the receivable records ledger. And, the other way the cash comes in is a locked box deposit system in Milwaukee. I would say that 80 to 90 percent of our cash goes to Milwaukee. The [572] vouchers are sent up and Mr. Krause matches the vouchers with the accounts receivable ledger.

* * * *

[574] Q Does his work cause him to have an interrelationship in performing that work with other people or employees of the company other than Mr. Schwoch and yourself?

A I'm not sure just what you mean by "interrelationship", but he does report to Agnus Hupke directly as to how much local cash is available for deposit to one or more banks.

Q Why to Agnus Hupke?

A Because she supervises Maryann Schwantes to make out the deposit tickets.

Q Does Mr. Krause have access to any information of a business nature which you would consider confidential in relationship to other employees of the company or to the general public?

A Well, I think the receivables—the dollar amount of our receivables and the condition of our receivables are something that I would not want to leave the company. I would not want it to be spread generally around the office. Not that we are ashamed of them, but—

Q And, is that information known only to the Credit Department, namely Schwoch and Krause, in addition to yourself?

A Generally, yes.

* * * *

[614] ARTHUR COLLIGAN

was called as a witness by and on behalf of the Employer and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * *

[615] Q (By Mr. Mueller) What is your present position with the company?

A I am a sales manager of the Industrial Division and Foundry Divisions.

* * * *

[619] Q Who is Miss Ehlke? Or is it Miss or Mrs?

A It's Mrs. Ehlke. Arlene Ehlke. She is my personal secretary.

* * * *

[620] A The only person that works in that office with me is Mrs. Ehlke. And she spends about 75 percent of her time in the office with me.

Q What is she doing—What is her job for you?

A Well, her job specifically are—is to handle with me all of the calls from our outside customers that come in, in regard to pricing or regards to—to delivery, as I said before. She keeps all of the records as far as what our costs are, how we do as far as costs are concerned. In other words, are we making any money on the parts that we're providing for our customers. She helps me quote jobs when they come in from customers, which is a big part of our business. In other words, when a person comes in and wants a job, we have to quote the job out to see that we get the right pricing for it and whether we are competitive. And so she and I together quote many jobs.

Q She participates with you in that process?

[621] A Yes.

She also takes care of seeing that the trucks that run for the Industrial Division are gotten out at the proper time. In other words, if someone wants to know when their—their stuff is read for delivery, she finds out when it's going to be ready. And then she makes a decision as to what day the trucks will deliver those parts and at what time. She sees that our trucks pick up tools and dies wherever they're made throughout the area.

Q She making independent decisions in that regard?

A Yes.

Q That are controlling on the company?

A Yes.

* * * *

[622] Q All right. Any other responsibilities she has?

A Yeah. Then she has the responsibilities of seeing when we're ordering tools—and I'm talking about dies now—that people besides ourselves buy, the customer buys tooling from—through us, and we go out and we procure that tooling. Now, at that time the two of us will sit in and decide what kind of tooling we want to get for a particular job.

Q You mean, "the two of us," you mean Mrs.—

A Mrs. Ehlke and myself.

Q Okay.

A We sit in and decide what kind of tooling has to be procured for that type of work.

Q Is anybody else participating with the two of you at that time?

A Not at that time, later—

Q Is she having eflective input with you on that progress?

A Definitely.

[623] Q And continue with—

A Okay.

Q —your description of her responsibility.

A Okay. Then what happens is we make a decision—This is the type of tooling now that we think is going to be needed to produce a part or a given number of parts. At that time we then take—and she would make out a letter going to the different companies, tool companies, that we decide that we're going to purchase these items from. And we ask those people either to come in and sit down with us—

Q Now, "us" being who?

A Mrs. Ehlke—Sit down with Mrs. Ehlke and myself. And to them go over with the tool and die people just exactly what we want to have in the way of tooling to produce the parts. At that time, then, once we made—Mrs. Ehlke and I have made that decision as to where we're going to go and buy this particular tool, we then ask the companies to present us with a formal quote for the tooling that we desire to produce the parts. Then she takes the cost of those tools and makes out a list showing the ones that we favor. If, say, we are having three or four companies quote these tools. Then she lists the ones that we most favor out of those three or four companies and tries to cut them down to the last two. Because strictly because of cost at that point.

Okay. Then at that point we now decided we're going

to [624] go to one of two companies to buy this equipment. And again I say us. Mrs. Ehlke and I decide that. Then at that point we go ahead and we say well, from your past—I say to her, from your past knowledge, which companies have done the best in regard to the quality that they've sent in, what have they done the best in delivery dates, and how does that fit into—into our line of—of delivery dates so that we can gel this whole thing together into one package.

Now, from that point on, I expect her to get that information for me so that at another date when we meet with the person who's now going to write out the purchase order for this tooling, we have this all worked out. And the person that we write out that purchase order at that time would be a Mr. Kroneberg.

Q Who decides as to which—Can we call them vendor from—Would vendor apply to the—

A Yes.

Q —the establishment that's making the quote on the tools?

A Yes, vendor.

Q Who decides which vendor to select?

A Mr. Kroneberg, Mrs. Ehlke, and myself.

* * * *

[629] Q You have access to cost information?

A Yes.

Q Does Mrs. Ehlke also have this access to that same information?

A Yes.

* * * *

[630] Q Does she have authorities to operate your section in your absence?

A Yes.

Q What would that include?

A Oh, that would include making decisions as to the—to costing, decisions in—to delivery dates, to providing people with information as to tooling costs, taking care of pricing of items. And I would say in general, running the office with regard to keeping the other

members of the group informed as to what has happened on a particular day, any phone calls that came in. She would provide our other members with that information.

Q In other words, coordinating the activity of the day or days that you're not there, together with the other members [631] who have responsibilities, so that your total effort is coordinated?

A Yes.

* * * *

CROSS EXAMINATION

[By Mr. Luker:]

* * * *

[633] Q What type of training?

A I would say taken from the number of years that she has worked with me, which has been, I think, about twelve years now, starting out with what I—knowledge I have had of tool and dies, which is very thorough. From those twelve years we, in the original years, sat down and went over dies together of every type. We went over blueprints together. We've looked and laid out blueprints. She's been in this tool and die part of it, because every time the tool and die people come into our place, she is in on every discussion. I'm talking about the people who own the tool and die companies. When they come in. And we sit down and discuss what we're going to do, what the tools are going to be made out of, what kind of tooling we're going to get. She sits on every one of those discussions.

Q You testified that she has a desk, I believe, just outside of your office.

A Yes.

Q And that she spends 75 percent of her time in your office.

A Yes.

Q Does she have a desk in your office?

* * * *

[634] A No. She uses my desk face to face with me.

* * * *

REDIRECT EXAMINATION

* * * *

[646] Q (By Mr. Mueller) In connection with—with your work relationship with Mrs. Ehlke as you explained it, is it accurate to say that you are working together, for instance, in the area, as an example, quoting prices? You are working together to determine that part of the project, and so that it can be moved on from there—

A Yes.

Q —to the next step of the—

A Yes.

Q Do you ever discuss with her management policy matters that may have been discussed or determined in your management meetings?

[647] A Some of them.

Q And what would be a reason for doing that?

A Because I think that she should know what our—our overall picture is concerned, whether we're looking for more business, whether at the particular time we've—we're pretty well loaded in certain departments, have to acquire any more work in there, whether we anticipate there's going to be price increases in the near future, what those percentages might be.

Q By price increases, you mean price increases—

A To our customers.

Q Do you consider this pricing information, costing information, of a business nature that is sensitive and confidential as to the public and the other employees of the company?

A I do.

Q And does she have access to that?

A Yes.

Q Why do you consider that confidential?

A I think it's most important that that type of a thing be held in strictest confidence because as I know and everyone that we're doing business with knows, this type of business is very competitive. And anyone with that type of information could very easily go ahead and divulge things that we wouldn't want to be known. I'm sure of that.

[648] Q Why wouldn't you want it to be known? I think that's really the point.

A You mean—

Q Why wouldn't you want someone else on the outside to know?

A Why wouldn't we want someone on the outside to know?

Q Correct.

A Because there's an awful lot of people just in this locality itself that would just love to have the type of work we're doing. And if anyone knew that, they could outbid us on some jobs very easily.

* * * *

[651] MICHAEL W. M[AIER]

was recalled as a witness by and on behalf of the Employer and, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

[By Mr. Mueller:]

* * * *

[660] Q You mentioned jobbing business. And I note from memory that Mr. Colligan said your company has basically been in the jobbing business for the past ten years. Is that an accurate statement?

A Yes. We're actually a company in transition. Our appliance business has not done extremely well. Competition is severe. So what we try to do is pick up outside work with [661] outside people. And it's been growing for about a ten-year period.

* * * *

[822] LARRY WENDLANDT

was called as a witness by and on behalf of the Petitioner and, having been first duly sworn, was examined and testified as follows:

* * * *

CROSS EXAMINATION

[825] Q (By Mr. Mueller) Mr. Wendlandt, in performing your job, you have access to certain information

or information that you're using relative to the performance of your job?

A (Nods head affirmatively.)

Q And I just have to remind you, you have to say yes because she takes everything down.

A Okay.

Q And she can't take—(nods head affirmatively)—down.

A Okay.

Q What type of information do you have access to? What kind of information do you work with?

A Payroll information, inventory, accounts payable, accounts receivable, and—yes, several other things, I'm sure.

Q Think of anything else?

A Sales analysis information. Billing information.

Q How about sales costing analysis information?

A Correct.

[826] Q Any kind of production type reports?

A Correct.

Q And all that information is at your complete disposal relative to the performance of your work? Right, wrong, or indifferent?

A In other words, do I have access to it?

Q Yes.

A Correct.

Q And ultimately that is the type of information for which Mr. Ehlke is responsible for as the comptroller?

A That's correct.

* * * *

Linda Anderson, Witness

REDIRECT EXAMINATION

* * * *

[828] Q (By Mr. Luker) Do you have—How many key punch operators in your department?

A Two full time.

Q Would these key punch operators have access to the same information you have and Mr. Wendlandt have access to?

[829] A Well, they punch up the information. But then a lot of times we have to do more things to make it into a report. I don't know how else—

Q Like what, for instance?

A Well, like every day they punch up cash or whatever we receive. You know. And to them it really doesn't amount to too much. But then—Like when I run it, I can see, like, who's paid up and who isn't.

Q Uh-hmm.

A I don't know—

Q I think that's—

A You know, I don't know—

Q Okay. That's good enough.

HEARING OFFICER: Mr. Mueller?

RECROSS-EXAMINATION

Q (By Mr. Mueller) Following that up, Mrs. Anderson, is it fair to say what you were trying to say is that the key punch operators in their access to that information, it is in disjointed fashion?

A Yes.

Q But your access is such that it all joins together, and it becomes meaningful as to whatever the report might be?

A Yes.

Q Whether it be shop payroll—In other words, you have [830] it as a whole?

A Yes, yes.

Q Relative to shop payroll. And the same would be with regard to sales costing analysis?

A (Nods head affirmatively.)

Q And you are nodding your head yes.

A Oh, yes.

Q And the same would be true for sales analysis information?

A Yes

Q And receivables?

A Yes.

Q And payables?
A Yes.

* * * *

[832] DAVID SOLDNER

was called as a witness by and on behalf of the Petitioner and, having been first duly sworn, was examined and testified as follows:

HEARING OFFICER: Thank you.

DIRECT EXAMINATION

Q (By Mr. Luker) Mr. Soldner, would you state your name and spell it for the record, please?
A David Soldner. That's S-o-l-d-n-e-r.
Q Are you employed by Monarch Range?
A Yes.
Q How long have you been in their employment?
A Seventeen years.
Q What department do you work in, sir?
A Cost department.
Q How long have you been in that particular department?
A About eight years.
Q What do you do in the cost department, Mr. Soldner?

* * * *

[833] A Costing range parts, factory sales parts, and foundry parts.
Q You ever attend management meetings?
A Yes.
Q In what capacity?
A As cost accountant.
Q What's your input?
A Costing of various products and what certain items might [834] cost.
Q How often would you attend these meetings, Mr. Soldner?
A Oh, I would say it would vary. Maybe a couple times a month.

Q Who would be in attendance in these meetings?

A Mostly Earl Ehlke or Clyde Sterner and myself, and Miss Maier.

CROSS EXAMINATION

[By Mr. Mueller:]

* * * *

[837] Q When you prepare this shipping memo, does it show on there or do you indicate on there what it costs to make that part?

A No.

Q Do you have access to that type of information, what it costs to make that part?

A Yes, uh-hmm.

Well, I should restate that. There's a cost code that goes on this invoice. The cost doesn't actually show on the shipping memo. But this cost code, then, is related back to the cost of the part.

Q And you have access to that cost—

A Yes.

Q —information?

Where do you get that information, the cost information?

A Off our cost sheets. We actually cost the parts from the actual cost.

Q So that with the—in the performance of your job, you're able to know and you do know what it's costing the company to make a particular product?

A Yes.

Q Or part, as you call it?

[838] A Yes.

Q And also the price that the company's charging the customer?

A Yes.

Q And which customer it is?

A Uh-hmm.

Q Do you work with monthly reports with showing the summaries of manufacturing sales and costs?

A Yes. With the factory sales report.

Q Would you describe what that is?

A That shows the total amount of sales for a given customer and the total cost and the percentage mark-ups.

Q Is that summary, then, on a monthly basis?

A Yes.

Q Is this a necessary part of your job to have that?

A Yes.

Q Or why or how, in what way?

A When we prepare it for management through the IBM system.

Q In other words, is it proper to say that you retrieve that information from the computer and then prepare a report for management for review?

A Yeah. It is actually prepared through the computer from these cost numbers that we give them against our costs and selling price.

Q So—

[839] A But I check it then and send it back to the computer if there's any errors for the month. And then they return it, and then it's given out to management.

Q By management you mean it could include, like, Mr. Maier?

A Right.

Q Mr. Ehlke?

A Yes.

Q Do you know who else gets those?

A Art Colligan. And I really don't know who else gets all of them.

Q Am I to understand from what you are saying with regard to these monthly reports, that it is your responsibility to prepare those?

A In a sense that I give the IBM—the code numbers for the cost and the selling prices. The actual computer itself does the printing of this report.

Q And then check the printout?

A That's right, check the printout for mistakes, right.

• • • •

[849] DENNIS KRAUSE

was called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

HEARING OFFICER: Thank you.

DIRECT EXAMINATION

Q (By Mr. Luker) Would you state your name?
A Dennis Krause, K-r-a-u-s-e.
Q Where are you currently employed, Mr. Krause?
A Monarch Range Company.
Q How long have you worked for Monarch Range?
A Approximately fifteen and a half years.
Q What department do you work in?
A Presently credit department.

* * * *

CROSS EXAMINATION

[By Mr. Mueller:]

* * * *

[854] Q Going back to these floor plans, as you call them, relating to the secured interest. Does—Is that your responsibility, a major part of your responsibility?
A Well, I record them on our records up there.
Q And does that give you access to which customers have a—an interest owing to the company?
A Yes.
Q And the amounts?
A Yes.
Q What other type of information do you have access to relative to the credit?
A I don't think anything that's in regards to—receivables, I imagine. Account receivables.
Q Does that identify customers?
A Yes, identifies customers, amounts they—
Q Any other form or fashion relative to accounts receivables, any other thing indicated other than what they owe and their name?
A Such as what?
Q That's what I'm asking. That's what I'm asking. If the access to the accounts receivables gives you any information [855] other than the customer and the amount they owe.
A Yes, I—I know—I know their account, what they owe, the invoices what they owe on, the money that they pay on it.

Q As they pay it?

A As they pay it, yes.

Q You have responsibility to the receipt of the cash? Correct?

A Right.

Q As it's received by the company?

A Yes.

Q And the recording of it?

A Right. On their receivable part.

Q Any other responsibilities relative to cash that's received by the company?

A It's generally mostly the receivable part. I do add any miscellaneous receipts that come in on the tape so we have a daily tape total. Other than that, that's usually taken care of by another person.

Q So at the end of each day you know, because of the work you are doing for the credit department and the company, how much the company has taken in in terms of cash because of the tape total?

A Yes.

Q Is that ever compiled for summary report by your department?

[856] A No. That's handled in another division or another section. Another person takes care of the totaling and recording of it.

Q Who's that?

A Maryanne Schwanz (phonetic).

* * * *

REDIRECT EXAMINATION

* * * *

[858] Q Okay. You testified that you compile the cash figures as a—you know, on a daily basis, I believe.

A Uh-humm.

Q Does the—all the cash owing to Monarch Range come in directly to Beaver Dam?

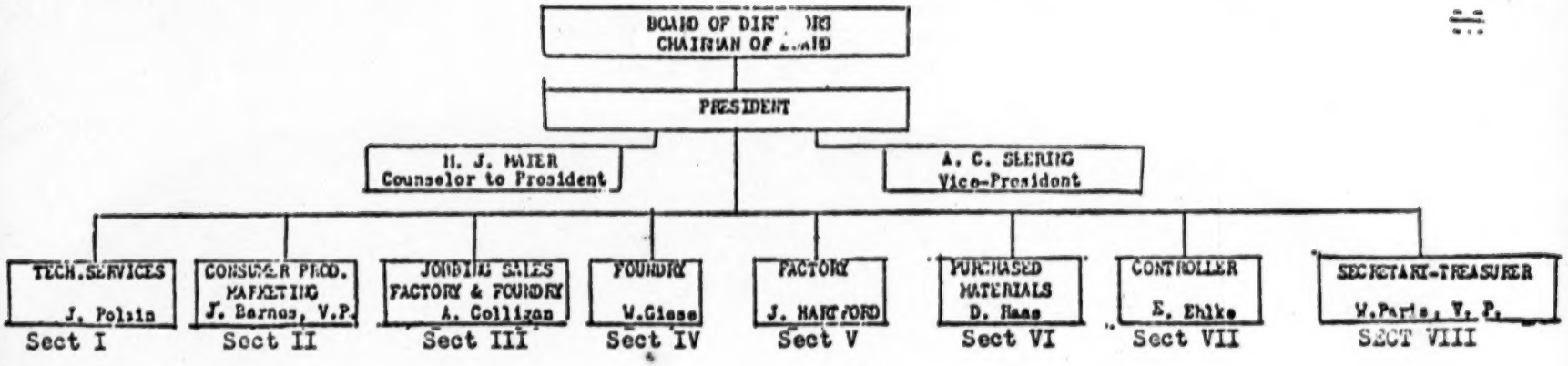
A No. Some of it comes into a lock box in Milwaukee.

Q What do you get from that Milwaukee location?

A Just the envelopes and receipt and amount that each customer paid on it.

Q How often do you get this?

A Daily.



NATIONAL LABOR RELATIONS BOARD

Docket No. 20-RC-3492 OFFICIAL EXHIBIT NO. Employer #1 - 16

Disposition: Identified X / Received X / Rejected

In the matter of Vanderbilt Products Employer

Date 1/8/75 Witness Garcia Reporter Ehl

No. Pages 9

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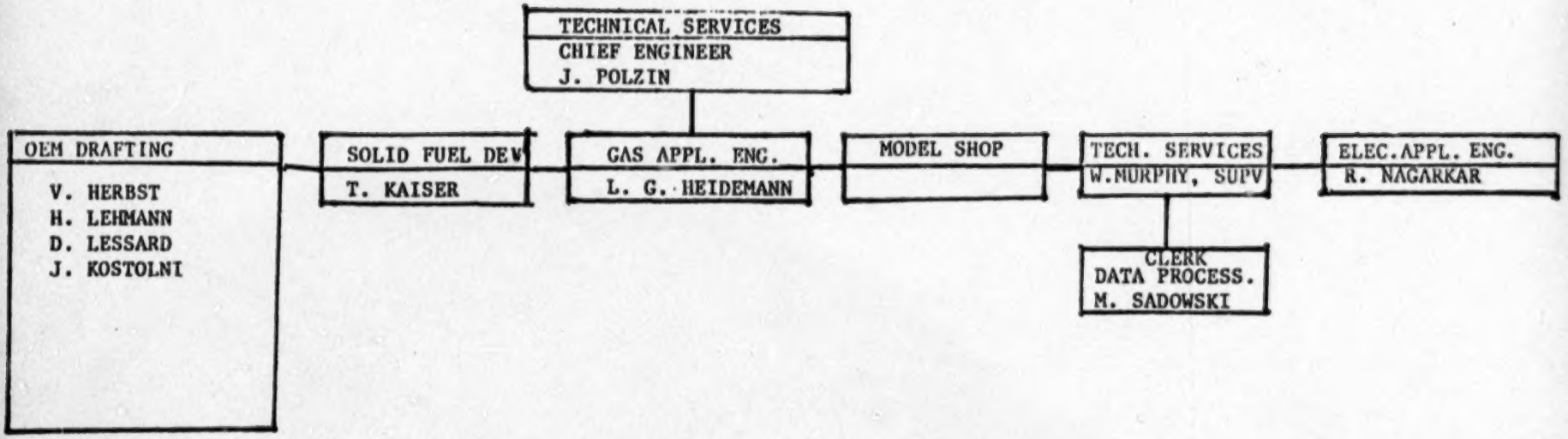
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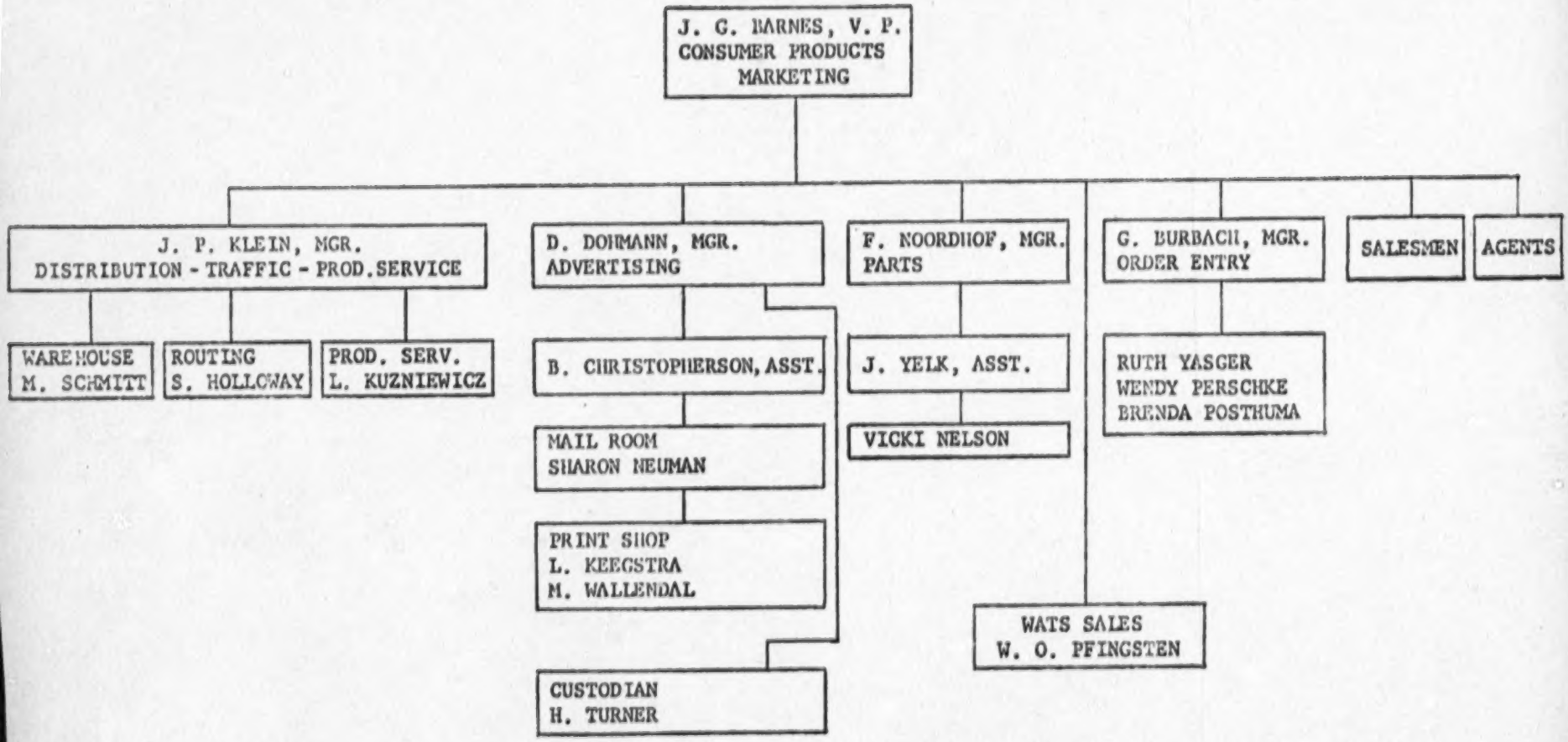
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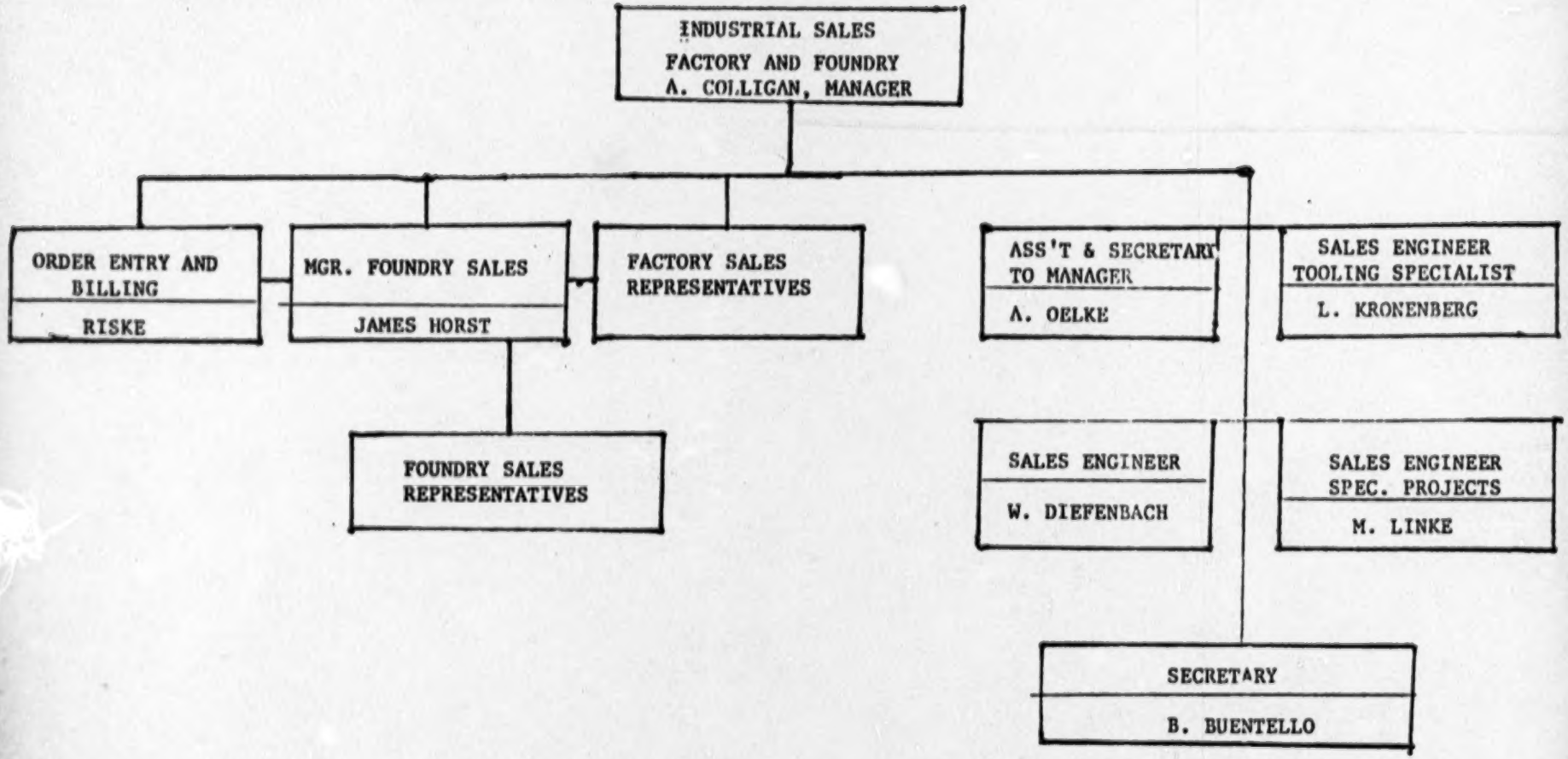
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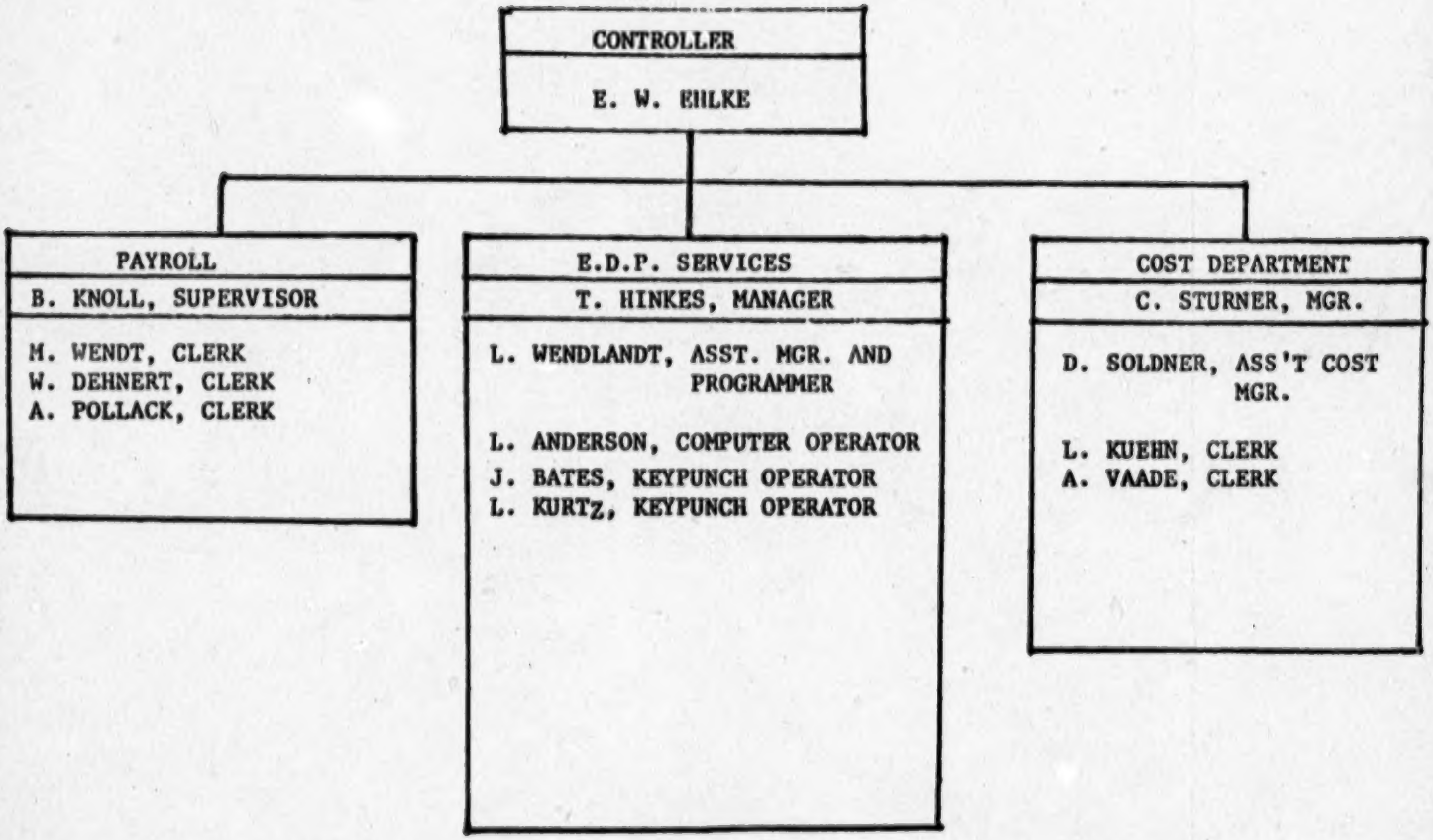
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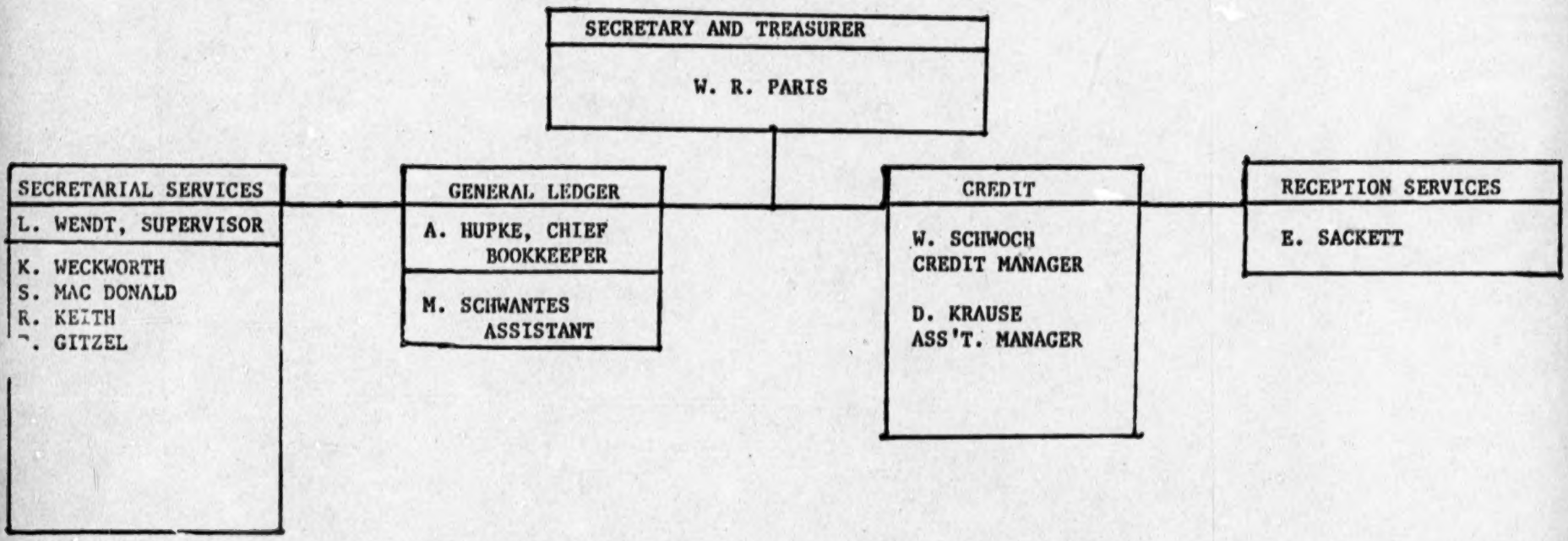

SUPREME COURT OF THE UNITED STATES

No. 80-885

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

and

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MALLEABLE IRON RAN[GE] COMPANY

ORDER ALLOWING CERTIORARI. Filed March 2, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is consolidated with case No. 80-1103, Hendricks County Rural Electric Membership Corporation v. National Labor Relations Board, and a total of one hour is allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 80-1103

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ORDER ALLOWING CERTIORARI. Filed March 2, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is consolidated with case No. 80-885, National Labor Relations Board v. Hendricks County Rural Electric Membership Corporation, and a total of one hour is allotted for oral argument.

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No. 80-885

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

HENDRICKS COUNTY RURAL ELECTRIC
MEMBERSHIP CORPORATION

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

MALLEABLE IRON RANGE COMPANY

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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MALLEABLE IRON RANGE COMPANY

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent Hendricks County Rural Electric Membership Corporation files this Brief in Opposition to the

Petition for A Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit as filed by the Solicitor General, Respondent having been granted by the Clerk an extension until February 2, 1981, in which to file its Brief.

JURISDICTION

The Solicitor General on behalf of the Petitioner, National Labor Relations Board, attempts to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1) indicating a timely filing within ninety (90) days plus an additionally granted forty-five (45) days from the July 21, 1980, Judgment of the Court of Appeals in *Hendricks II* (Petitioner's App. B, 14a-15a) denying enforcement of the Board's Supplemental Order. Respondent Hendricks County Rural Electric Membership Corporation contends that jurisdiction does not exist due to the untimeliness of the filing of the Petitioner's Petition for A Writ of Certiorari. The Judgment of the Court of Appeals in *Hendricks I* (Respondent's App. A, *infra*, 1a-2a) reversing the Board's Order and remanding, was entered by that Court on July 26, 1979, which is the appropriate date from which the appeal period began to run regarding the question being presented to this Court by the Petitioner.

STATEMENT OF THE CASE

1. The Administrative Law Judge (ALJ) and the Board found that on May 9, 1977, the "top executive officer" and "General Manager" of the Hendricks County Rural Electric Membership Corporation (Hendricks or REMC) had discharged his secretary, Mary Weatherman, because she had signed a petition directed to the REMC's board of directors requesting that they reconsider the board's decision not to reinstate disabled Lloyd Hadley as an employee. Mr. Hadley became disabled in February, 1976, as a result of an employment accident, and in April, 1977, the board notified Hadley that he would not be reinstated as an employee. (P. App. E, 38a-39a) In addition to

contesting that the discharge was an unfair labor practice, Hendricks claimed at the evidentiary hearing and in its Trial Brief of February 6, 1978, to the ALJ, that Weatherman was excluded from the coverage of the National Labor Relations Act (Act) and that the Board lacked jurisdiction for two separate reasons: (1) As a "confidential employee" in her capacity as secretary to the General Manager and top executive and operating officer of the employer, and (2) As a person working in "personnel and employment departments." Although the ALJ specifically concluded "that Weatherman was not a confidential employee as the Board defines that term," he made no decision as to whether she was excluded from the Act as an employee working in "personnel and employment departments." (P. App. E, 49a)

However, in concluding that Weatherman was not a confidential employee under the Board's "labor nexus" standard, the ALJ determined that Weatherman opened mail addressed to Hendricks and Dillon except for correspondence from Hendricks' lawyers to the union, kept and processed all insurance claims of employees, typed Manager Dillon's letters and notices as to the dates of labor negotiation meetings, and typed minutes of the meetings of the REMC's board of directors including minutes containing references to Hadley's request for reinstatement and to other personnel matters. Additionally, the ALJ stated that Dillon was present at labor negotiation meetings with the union and collected papers relating to labor contract negotiations including copies of positions developed by the REMC's negotiating committee and his notes taken during negotiations; and that Assistant Manager Spencer had testified that while he (Spencer) made determinations of "management policy concerning the interpretations of the labor contract with the IBEW" union, that such determinations were approved by Dillon. (P. App. E, 45a-47a)

Although Hendricks filed five specific Exceptions to the Decision of the ALJ with the Board including both jurisdictional issues, the Board adopted the Decision and Order of the ALJ without specifically ruling upon the Exceptions presented by Hendricks. (P. App. E, 33a-35a) Thereafter, Hendricks filed a Petition for Review of Order of the NLRB with the United States Court of Appeals for the Seventh Circuit. The NLRB petitioned the Court for enforcement of its Order. Although concurring that she was not a "confidential employee" under the Board's "labor nexus" standard, the Court of Appeals reversed the Board's Order and remanded stating that it was "necessary to remand the decision for a new determination of her 'employee' status." (P. App. D, 24a, 26a, 27a; R. App. A, 1a & 2a) The Court of Appeals after discussing the decision of the Supreme Court in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), held that "The legislative history of the Taft-Hartley Act, as interpreted in *Bell Aerospace*, requires the conclusion that *all* secretaries working in a confidential capacity, without regard to labor relations, be excluded from the Act" and concluded that the ALJ had "limited his factual inquiry to a determination that Weatherman had not acted in a confidential capacity with respect to labor relations." The Court of Appeals remanded the case to the Board "for a determination of whether 'by the nature of [her] duties' she was 'given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.' H.R. 3020 §2(12)(C), 80th Cong., 1st Sess. (1947)." (P. App. D, 31a)

2. On October 10, 1979, the Board accepted the Court's remand and advised the parties that they may file "Statements of Position with the Board with respect to the issues raised by the remand." In its Statement of Position, Hendricks stated "that the Board should order a reopening of the proceedings to present further evidence regarding

the issues on remand" and specifically pointed out to the Board that the REMC competes with another utility and was involved in litigation cases with that utility during Weatherman's employment. (P. App. A, 3a) The Board failed to rule upon Hendricks' request to reopen the record on remand, and issued its Supplemental Decision and Order on January 22, 1980, and stated therein that "Accepting the court's criteria for resolving questions of confidential employee status as the law of this case only, we find that Weatherman was not a confidential employee." (P. App. C, 18a & 19a) Hendricks again filed a Petition for Review with the Court of Appeals, and thereafter, the NLRB petitioned the Court of Appeals for enforcement of its Order. The Court of Appeals granted the Petition for Review and denied enforcement of the Order stating that "we adhere to everything we said in *Hendricks" I* and holding that the Board had erred in not allowing a new evidentiary record and by not applying the new standard to define a confidential employee as determined in *Hendricks I*. The Court found and held as follows:

> The Board did not reopen the proceedings under the different standard, did not take any additional evidence, did not remand the proceedings to the administrative law judge who heard the original evidence, and has sent us the same record we reviewed before. We are asked to enforce an order which purports to apply the new standard to the old record, but actually reapplies the old standard incorporating the labor nexus. (P. App. A, 7a & 8a)

SUMMARY OF ARGUMENT

The Court should deny the Petitioner's Petition for A Writ of Certiorari for the following reasons:

1. Jurisdiction does not exist pursuant to 28 U.S.C. 1254(1) since the Government's Petition for A Writ of Certiorari was not filed within ninety (90) days after the Judgment of the Court of Appeals in *Hendricks I* of July 26,

1979, which date commenced the appeal time period since the Board on remand failed to abide by the Order and to apply the law specified by the Court of Appeals.

2. The Supreme Court has previously settled the issue presented in the Petition for A Writ of Certiorari by holding in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), that employees "impliedly excluded" from the coverage of the National Labor Relations Act "were persons working in 'labor relations, personnel and employment deparments,' and 'confidential employees'" and that "The discussion of 'confidential employees' in both the House and Conference reports, however, unmistakably refers to that term as defined in the House bill which was not limited just to those in 'labor relations.'"

3. A conflict does not exist regarding the definition of the "confidential employee" exclusion between the Seventh Circuit and the other three (3) circuits since the cases cited by the Solicitor General in the Petition either did not involve the definition of this exclusion or did not involve arguments as to the proper legal standard itself, but rather only the application of the standard.

ARGUMENT

1. The Court of Appeals in *Hendricks II* after first stating that "we adhere to everything we said in *Hendricks" I* regarding the exclusion of "confidential employees" from the Act without limiting confidentiality to "labor relations," specifically found that the Board on remand should have reopened the evidentiary record and had failed to apply the law established in *Hendricks I*. The court stated "We are asked to enforce an order which purports to apply the new standard to the old record but actually reapplies the old standard incorporating the labor nexus." (P. App. A, 6a-8a) The Court of Appeals found that "reading the administrative record makes it obvious that the admonitions [of the ALJ] were observed inasmuch as there is clearly a conscious effort by all participants to restrict the evidence to that which pertains to labor or personnel matters." "The Board did not reopen the proceedings under the different standard, did not take any additional evidence, did not remand the proceedings to the administrative law judge who heard the original evidence, and has sent us the same record we reviewed before" even though the company had asked that the proceedings be reopened to present further evidence. (P. App. A, 7a) The NLRB did not request a rehearing in banc of any determination made by the panel in *Hendricks I* or in *Hendricks II* (P. App. A, 5a), and has not presented as an issue to this Court the conclusion of the Court of Appeals that the Board failed to comply with its decision and remand order in *Hendricks I*. Rather, the Board now asserts that the law set forth by the Court of Appeals as to the definition of "confidential employees" is incorrect.

In *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 378 & 379 (1965), the Court, by a seven-member majority, held as follows:

> After a court of appeals has set aside an order of the Commission on a point of law, the Commission may seek certiorari if it disagrees with the court's legal

> conclusion. Section 5(i) of the Federal Trade Commission Act contemplates that when the time for filing a petition for certiorari has passed without a petition being filed, the Commission will enter an order in accordance with the mandate of the court of appeals. The Commission may not merely restate its former position in a new order and then apply for certiorari when the court of appeals reiterates its previous objection. As was said in *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20, 97 L.Ed. 15, 20, 73 S.Ct. 85, 'If the Court did no more by the second judgment than to restate what it had decided by the first one... the 90 days would start to run from the first judgment.' To the same effect see *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211, 97 L.Ed. 245, 251, 73 S.Ct. 245.

In discussing the application of this premise, the Court, in *Federal Trade Comm'n v. Colgate-Palmolive Co., supra*, at 379, further held that "Obviously, the court which drafted the mandate is normally in the best position to determine whether the Commission's subsequent order is consistent with the mandate, but this Court is never foreclosed from determining the issue for itself." Similar to Section 5(i) of the Federal Trade Commission Act, 29 U.S.C. §160(e) contemplates that the NLRB will enter an order in accordance with the mandate of the court of appeals unless it timely files a petition for writ with the Supreme Court. (R. App. B, 3a & 4a) The Supreme Court has held that "the statute with respect to a judicial review of orders of the Labor Relations Board follows closely the statutory provisions in relation to the orders of the Federal Trade Commission, and as to the latter, it is well established that the Court may remand the cause to the Commission for further proceedings to the end that valid and essential findings may be made." *Ford Motor Company v. NLRB*, 305 U.S. 364, 373, citing *Federal Trade Comm'n v. Curtis Pub. Co.*, 260 U.S. 568, 580 & 583, 67 L.Ed. 408, 413 & 414, 43 S.Ct. 210. ¶29 U.S.C. §160(e) provides in its relevant part as follows:

> Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review...by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

The Court of Appeals in *Hendricks II*, discussed the failure of the Board to reopen the evidentiary proceedings, stating that "If we had believed that the prior record was sufficient to support a finding under the *Bell Aerospace* standard, we would not have remanded the proceeding to the Board" and that "When an erroneous standard for the admission of evidence is used, it follows almost mandatorily that a new record is needed, not only to add evidence in patchwork fashion but also possibly to rehear all the relevant evidence under the different admission standard." (P. App. A, 7a) Additionally, the true position of the Board regarding the new legal standard was noted by the Court of Appeals stating as follows in *Hendricks II*: (P. App. A, 5a)

> Although the Board has accepted our prior decision in this case, in at least one subsequent case pending on review before us, *Malleable Iron Range Co. v. NLRB*, No. 79-1991, the Board strongly urges that our prior decision be overruled, either on the basis that the Supreme Court was in error or mislead as to the legislative history in footnote 12 or because of the court's later opinion in *NLRB v. Yeshiva University*, 100 S.Ct. 856 (1980).

In finding that the Board had applied the old standard incorporating the labor nexus, the Court of Appeals also disagreed with the "Board's gratuitous conclusion that the Company 'is a cooperative, and that all members *presumably* have access to [its] documents....'" (P. App. A, 8a)

The decision and Judgment in *Hendricks II* merely restated the decision in *Hendricks I*, without any expansion

of that decision, and then held that the Board had not complied with the remand and denied enforcement of the Board's Order. In *Hendricks I*, the Court of Appeals had concluded that all confidential employees and not just confidential secretaries were excluded from the Act by stating:

> Relying on the legislative history, the Supreme Court in *Bell Aerospace* concluded that confidential employees, including confidential secretaries, were persons "who both the House and the Senate believed were plainly outside the Act." 416 U.S. at 283 (P. App. D, 29a)

Justice Douglas in *Federal Power Comm'n v. Idaho Power Co., supra*, stated in expressing the majority opinion that "If the court did no more by the second judgment than to restate what it had decided by the first one... the 90 days would start to run from the first judgment." Therefore, the Board's Petition for A Writ of Certiorari is untimely by 15 months as to the jurisdictional exclusion standard raised therein since the Court of Appeals determined that standard in its Judgment of July 26, 1979, and the Board on remand failed to apply the law so established.

2. The Supreme Court, in holding that buyers were managerial employees excluded from the jurisdiction of the National Labor Relations Act in *NLRB v. Bell Aerospace Co., supra*, 283, stated as a basis for its decision as follows:

> There were other persons, however, who both the House and the Senate believed were plainly outside the Act. The House wanted to make the exclusion of certain of these persons explicit. In the conference agreement, representatives from both the House and Senate agreed that a specific provision was unnecessary since the Board had long regarded such persons as outside the Act. Among those mentioned as impliedly excluded were persons working in "labor relations, personnel and employment departments," and "confidential employees."

The Supreme Court, in *Bell Aerospace, supra*, at 283, n.12, further stated as follows:

> In 1946, in *Ford Motor Company*, 66 N.L.R.B. 1317, 1322, the Board had narrowed its definition of "confidential employees" to embrace only those who exercised "'managerial' functions in the field of labor relations." The discussion of "confidential employees" in both the House and Conference Committee Reports, however, unmistakably refers to that term as defined in the House bill, which was not limited just to those in "labor relations." Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.

Although disagreeing with the majority opinion delivered by Justice Powell, that managerial employees are not covered by the Act, the minority opinion issued by Justice White agreed that "The House Managers' statement accompanying the Conference Committee Report explains that the Act was not amended expressly to exclude labor relations and confidential employees from coverage under the Act, because it was already prevailing Board practice to exclude these employees." It found that Congress "expressed a desire to exclude only labor relations and confidential employees whom it thought the Board had previously held outside the Act..." *Bell Aerospace Co., supra*, at 304 & 305. Thus, the minority opinion did not take issue with the majority's decision that "confidential employees" were not limited just to those in labor relations, and in fact, held that Congress had expressed a desire to exclude both "labor relations and confidential employees," as two specified groups. The minority opinion in *Bell Aerospace* in arriving at this conclusion quoted a portion of H.R. Conference Report No. 510, 80th Cong., 1st Sess., 35-36 (1947) as follows in part at p. 303:

> "The conference agreement, in the definition of supervisor, limits such term to those individuals

> treated as supervisors under the Senate amendment. In the case of persons working in labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential employees as well, and it was not the intention of the conferees to alter this practice in any respect...."

Additionally, Justice White at p. 306 wrote "Perhaps it was clear to Congress that a confidential secretary's supervisor would be excluded by the Act, but such an individual would either be a confidential employee himself, or a supervisor, or both." In *Hendricks*, both the Board and the Court of Appeals found that the discharged employee was the "personal secretary to its [the Company's] general manager and chief executive officer." (P. App. A, 2a); and the Board found that the general manager attended labor negotiation meetings, collected papers relating to labor contract negotiations including positions developed by the REMC's negotiating committee and notes taken during negotiations, and approved "determinations of 'management policy concerning interpretations of the labor contract with the IBEW'" union. (P. App. E, 47a) Therefore, Weatherman was the personal secretary to a "'super' supervisor" and "confidential employee." *Bell Aerospace, supra*, 307, n.3. Congress intended to exclude as confidential "people who receive from their employers information that not only is confidential, but also that is not available to the public, or to competitors, or to employees generally." *Bell Aerospace, supra*, 283, n.12. This was the remand instruction in *Hendricks I*. (P. App. D, 31a)

The NLRB's Petition for A Writ requests the Court to review and approve the Board's restricted definition of "confidential employee," and states that the "Board's 'labor

nexus' test accords with the overall policy and legislative history of the National Labor Relations Act" by arguing a different interpretation of the legislative history of the Taft-Hartley Act from that concluded by this Court in *Bell Aerospace, supra.* The Solicitor General argues that the "conferees specifically rejected the House bill's broad exclusion, and followed the Senate's version..." and that "the conferees noted their approval of the 'prevailing Board practice,' and that practice—which has been consistently followed for at least eight years prior to 1947—merely accorded a special status to confidential employees meeting the 'labor nexus' test...." (Petition for A Writ, 22) Nevertheless, this Court has already held that both "labor relations" employees and "confidential employees" were "impliedly excluded" and "plainly outside the Act" and that "although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover 'confidential' employees even under a broad definition of that term." *Bell Aerospace, supra,* 283 and n.12. The Court of Appeals, in *Hendricks II,* in reaffirming its prior decision, stated that "although the *Bell Aerospace* holding applied to managerial employees, the statement in note 12 about confidential employees was not a mere dictum, but was the basis, or at least part of the basis, upon which the holding itself was constructed." (P. App. A, 4a) Indeed, the Supreme Court recently reaffirmed *Bell Aerospace* stating in *NLRB v. Yeshiva University,* ___ U.S. ___, 63 L.Ed.2d 115, 125 & 126; 100 S.Ct. 856 (1980):

> Managerial employees are defined as those who "'formulate and effectuate management policies by expressing and making operative the decisions of their employer.'" *NLRB v. Bell Aerospace Co., supra,* 416 U.S. at 288....These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress, which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary." *Id.,* at 283.... Although the Board has established no firm criteria

> for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

Thus, the Supreme Court has not limited even the managerial employee exclusion to only those implementing *labor relations* policy; and nevertheless, the Solicitor General contends that the labor nexus limitation should be applied to "those explicitly mentioned by Congress, which 'regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary.'"

3. The Solicitor General in the Petition cites three cases as being in conflict with the Seventh Circuit's decision in *Hendricks*, and as resulting in a conflict between the Seventh Circuit and the Eighth, Sixth and Ninth Circuits. However, the Eighth Circuit, in *NLRB v. Hoerner-Waldorf Corp.*, 525 F.2d 805 (1975), did not define the term "confidential employee," but merely defined the term "supervisor" in excluding a supervisor from the bargaining unit. Secondly, the Sixth Circuit in *NLRB v. Allied Products Corp.*, 548 F.2d 644, 648, 649 & 650 (1977), stated that it had "declined to treat secretaries as confidential unless the managers for whom they work are sufficiently engaged in labor management negotiations to warrant exclusion of their secretaries," and that the "secretaries must enjoy confidential status with respect to those labor relation functions." Yet, the Sixth Circuit held that the Board had erred in including in the bargaining unit the personal secretary to "the general manager and chief labor relations administrator of the plant," and indicated its decision was "in spite of those precedents and recognizing the narrow scope of our review." Also, the court in *Allied Products* found that the Board erred in including in the unit the secretary of a division manager holding that "Although he is not directly responsible for the Company's relationship with the Union, and although

he does not formulate, determine and effectuate company labor relations policy, nevertheless, he does formulate, determine and effectuate company-wide *management policies* which critically affect labor relations;" and the Court noted that this secretary substitutes for the general manager's secretary. *Allied Products* is not inconsistent with *Hendricks* since it does not apply the "labor nexus" standard.

Thirdly, the decision of the Ninth Circuit in *Union Oil Company of California v. NLRB*, 607 F.2d 852 (1979), does not discuss whether the term "confidential employee" should be limited to labor relations as opposed to a broad definition of that term. Rather, the Ninth Circuit held that "because there is substantial evidence that the computer operators acted as record custodians for persons who did not formulate or implement labor policy, we conclude that there is an adequate basis for the Board's ruling" including them in the bargaining unit. There is no indication in the Ninth Circuit's Opinion in *Union Oil* that the company contended that the labor nexus legal standard applied by the Board in defining the terms "confidential employees" was incorrect. Additionally, the exclusion of secretaries to top executive officers is not the issue in *Union Oil*, but only whether computer operators had a confidential relationship with the personnel supervisor. Therefore, the conflict preceived by the Solicitor General is not an apparent one as where circuits disagree whether a union offer to waive initiation fees for employees who sign recognition slips before the election constituted an unfair election practice and interfered with the rights of employees, *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270, 38 L.Ed.2d 495, 94 S.Ct. 495 (1973), or as where circuits disagree whether a union could waive the employee's right to distribute literature on the employer's premises. *NLRB v. The Magnavox Co.*, 415 U.S. 322, 39 L.Ed. 358, 94 S.Ct. 1099 (1974)

CONCLUSION

The Court should deny the Board's Petition for A Writ of Certiorari since jurisdiction does not exist in that the Petition was untimely filed with this Court, since the Court has already determined the question presented by the Petition in this Court's decision in *NLRB v. Bell Aerospace Co., supra*, and since the decisions cited by the Solicitor General as being in conflict with the decision of the Seventh Circuit in *Hendricks* do not meritoriously argue whether the labor nexus standard of the Board is the proper definition of "confidential employee."

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January 21, 1981

APPENDIX

APPENDIX A

Opinion by Judge Sprecher
Judge Bonsal dissenting

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 78-2127

Before
Hon. Walter J. Cummings, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Dudley B. Bonsal, Senior
District Judge*

July 26, 1979

Hendricks County Rural Electric
Membership Corporation, Petitioner

vs.

National Labor Relations Board,
Respondent

Petition for Review of an Order
from the National Labor Relations Board

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* The Honorable Dudley B. Bonsal, Senior District Judge of the Southern District of New York, is sitting by designation.

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the National Labor Relations Board in this cause be, and the same is hereby, REVERSED, with costs, and REMANDED, in accordance with the opinion of this Court filed this date.

APPENDIX B

NATIONAL LABOR RELATIONS ACT

29 U.S.C. §160(e)

(e) Petition to court for enforcement of order—Proceedings—Review of judgment.

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code [28 USCS §2112]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be

taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28 [28 USCS §1254].

FEDERAL TRADE COMMISSION ACT

15 U.S.C. §45

(i) Order modified or set aside by court of appeals, when becomes final. If the order of the Commission is modified or set aside by the [circuit] court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

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No. 80-885

In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION,

Respondent.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MALLEABLE IRON RANGE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR MALLEABLE IRON RANGE COMPANY IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Malleable Iron Range Company, herein, does not agree with the Board's question presented for review; therefore, the following is submitted as a substitute should the Court decide to grant the Petition:

> "Whether the Court of Appeals for the Seventh Circuit erred by finding that the Board did not apply the proper legal standard of *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), relating to a determination of eligibility of employees in a collective bargaining unit; namely, that all confidential employees, and not only those in labor relations, are excluded from the protection of the National Labor Relations Act."

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In the Supreme Court of the United States

October Term, 1980

No. 80-885

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION,
Respondent.

NATIONAL LABOR RELATIONS, BOARD,
Petitioner,

vs.

MALLEABLE IRON RANGE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR MALLEABLE IRON RANGE COMPANY IN OPPOSITION

SUMMARY OF ARGUMENT

Review of the decision by the Court of Appeals for the Seventh Circuit is precluded by prior decision of the Supreme Court and the lack of any real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

ARGUMENT

In *NLRB* v. *Bell Aerospace*, 416 U.S. 267 (1974), this Court concluded "that Congress intended to exclude from the protection of the Act all employees properly classified as 'managerial'" (416 U.S. at p. 275), and not "just those in positions susceptible to conflicts of interest in labor relations". (416 U.S. at p. 274). This conclusion was guided by an examination of early Board decisions, the legislative history of the Act and subsequent Board and court decisions. (416 U.S. at p. 274). The legislative history was interpreted implicitly as excluding "confidential employees" from the protection of the Act where they "receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally." (416 U.S. at pp. 283-284).

The Court of Appeals below concluded that the Board did not apply the proper legal standard of *NLRB* v. *Bell Aerospace Co., supra,* in determining the bargaining unit eligibility of certain employees alleged by Respondent to be ineligible for at least the reason that the employees were confidential.[1]

[1] The Board correctly notes that Respondent's confidential employee ineligibility contention related to eighteen (18) employees. (Petition, pp. 11-12). However, the Court of Appeals did not address several other issues raised by Respondent; namely, (1) Whether thirteen (13) of the 18 and four (4) other employees should be managerial exclusions from the bargaining unit?; (2) Whether four (4) of the eighteen and another employee should be supervisory exclusions from the bargaining unit?; and, (3) Whether improper legal standards were applied by the Board in determining that time study and research-development engineers and plant clerical employees comprise an appropriate collective bargaining unit together with non-managerial-confidential office clerical employees?

In an Unpublished Order, the Court of Appeals applied the decision in *Hendricks County Rural Electric Membership Corp.* v. *NLRB*, 603 F. 2d 25 (CA-7, 1979), in which the Court ruled as follows:

> "The legislative history of the Taft-Hartley Act, as interpreted in *Bell Aerospace*, requires the conclusion that *all* secretaries working in a confidential capacity, without regard to labor relations, be excluded from the Act". (603 F. 2d at p. 30).

As a result, the Court of Appeals in the case below involving Respondent held that "all confidential employees, and not only those in labor relations, were excluded from the protection of the Act." (Petition, pp. 57a-58a). Consequently, the Court of Appeals remanded the proceedings to the Board"' * * * to permit the Board to apply the proper legal standard * * *.' *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 289 (1974)." (Petition, p. 59a).

The Court of Appeals has correctly interpreted and applied this Court's decision in the *Bell Aerospace* case.

Thus, the primary reason for denying the Petition is because the asserted issue for review has been foreclosed by the Supreme Court's decision in the *Bell Aerospace* case. Under this circumstance, the denial of a petition for a writ of certiorari is appropriate. *Burrell et al.* v. *McCray et al.*, 462 U.S. 471 (1976).

With regard to the Board's argument that the decision of the Court of Appeals below has "created a conflict among circuits concerning an important question of federal law that warrants review" (Petition, p. 13), it is well settled that certiorari is granted in this regard only "in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal". *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498,

502 (1950); *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1954); and, *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1922). The cases relied on by the Board do not satisfy this discretionary standard. The Court in *Union Oil Co. of California, Inc.*, v. *NLRB*, 607 F. 2d 852 (CA-9, 1979) did not rule that the "labor nexus" test was an indispensable element for determining confidential status; therefore, the ruling of the Ninth Circuit, that substantial evidence on the record as a whole supported the Board's determination that certain computer operators were not confidential employees, is not an apparent interference with the application of *Bell Aerospace* by the Seventh Circuit. The same applies to *NLRB* v. *Allied Products Corp.*, 548 F. 2d 644 (CA-6, 1977). The *dictum* from the opinion of the Sixth Circuit quoted by the Board to support the "conflict" argument is merely a restatement of precedents predating *Bell Aerospace*. (Petition, p. 15; 548 F. 2d at p. 648). The Sixth Circuit reversed the Board's determination that two secretaries were not confidential by applying a more expansive exclusionary legal standard than that which makes the "labor nexus" test an essential element. Similarly, *NLRB* v. *Hoerner-Waldorf Corp.*, 525 F. 2d 805 (CA-8, 1975) does not represent "a real and embarrassing conflict of opinion and authority", because the case was disposed of by the Eighth Circuit solely on a supervisory exclusion question and the Court only summarily dealt with a contention relating to the confidential status of certain employees.

The Board's fundamental position in seeking review distills to a dissatisfaction with this Court's rejection of the "labor nexus" test. From this the Board argues that the Case should be reviewed because it involves a question of public importance. However, a claim by a party litigant that an adverse court decision will have profound

effects contrary to that party's interpretation of the law should not be a sufficient ground for granting a petition for a writ of certiorari.

Lastly, in view of this Court's decisions in *Bell Aerospace*, which involved a thorough review, analysis and interpretation of the legislative history of the Act, and *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980), any change to or reversal of the prevailing legal standard, which applies to the determination of managerial-confidential eligibility questions to the extent that the "labor nexus" test is not an indispensable element thereof, should be made by the legislative process and procedures.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted

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January, 1981

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No. 80-885

In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER
v.
HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

NATIONAL LABOR RELATIONS BOARD, PETITIONER
v.
MALLEABLE IRON RANGE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1980

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

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HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MALLEABLE IRON RANGE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

Respondent Hendricks County Rural Electric Membership Corporation ("Hendricks") contests (Br. in Opp. 7-10) the timeliness of the Board's petition for a writ of certiorari in *Hendricks*, claiming that the standard for determining the status of "confidential employees" under the National Labor Relations Act was initially decided by the court of appeals in *Hendricks I*, and that the Board was therefore required to seek review of that issue within 90 days of entry

of judgment in *Hendricks I*, rather than awaiting that court's final judgment in *Hendricks II*.[1] There is no merit to this contention.

1. As fully set forth in the petition (Pet. 5-11), the Board, in its initial decision in *Hendricks*, found that Mary Weatherman was not a "confidential employee" excluded from the protection of the statute because she did not act in a confidential capacity with respect to labor relations (Pet. App. 44a-49a). The court of appeals sustained the finding that Weatherman lacked a "labor nexus," but held that the Board's use of the "labor nexus" test was "an error of law" and remanded the case to the Board for reconsideration under a broader standard of confidentiality, "without regard to labor relations [matters]" (*id.* at 27a, 31a). The Board accepted the remand and determined that Weatherman was not a "confidential employee" even under the court's broader standard (*id.* at 19a-20a). The court of appeals thereafter denied enforcement, restating its rejection of the "labor nexus" test (*id.* at 3a-6a), and holding that the Board's factual determination that Weatherman was not a "confidential employee" under the court's broader test was not supported by substantial evidence (*id.* at 6a-8a). The Board now seeks review of the judgment entered by the court pursuant to its second decision (*id.* at 14a-15a).

2. Although the Board could have sought review of the court of appeals' rejection of the "labor nexus" test based on the judgment in *Hendricks I*, its decision to accept the remand poses no bar to review of that issue at this time. It is well settled that a petition timely filed with respect to a final judgment rendered by a lower court vests plenary jurisdiction in this Court over "all of the substantial federal questions determined in the earlier stages of the litigation."

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[1]The judgment in *Hendricks II* (Pet. App. 14a-15a) was entered on July 21, 1980, almost one year after the court of appeals rendered its decision in *Hendricks I* (see *id.* at 22a).

Reece v. *Georgia*, 350 U.S. 85, 87 (1955). See also *Mercer* v. *Theriot*, 377 U.S. 152, 153-154 (1964); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-258 (1916). Cf. *Falk* v. *Brennan*, 414 U.S. 190, 194 n.7 (1973).

The soundness of this rule, and its consistency with established principles of orderly and prudential judicial review, is manifest here. If the court of appeals had sustained the Board's post-remand finding that Weatherman was not a "confidential employee" even under the broader standard, the court would have enforced the Board's order. Thus, there would have been no need, in the *Hendricks* case, for this Court to resolve the question whether the Board or the court below was correct as to its definition of "confidential employee." The principle that courts should not review issues "until they have to" (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 155 (1951) (Frankfurter, J., concurring)) is particularly apt where, as here, the lower court has created a new, broadly applicable rule of law, the scope of which had not yet been tested by any factual application. Indeed, the striking exclusionary sweep of the standard articulated in *Hendricks I* was not evident until it was applied in *Hendricks II*, where the court based its conclusion that Weatherman was not protected by the Act on a record which, as the dissent noted (Pet. App. 10a), showed that she was responsible for only one clearly confidential task: the processing of employee medical and disability insurance claims, the possible disclosure of which was not likely to put her employer to any competitive disadvantage. With the case in its present posture, this Court can better evaluate the practical significance of the legal standard adopted by the court below. Compare *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 383-384 (1965) (post-remand review appropriate where remand proceedings served to sharpen focus of dispute between court of appeals and agency).

3. Hendricks contends that this case falls within the rule that an administrative agency may not accept a remand from the court of appeals, " 'merely restate its former position in a new order[,] and then apply for certiorari when the court of appeals reiterates its previous objection' " (Br. in Opp. 8; citation omitted). That rule, however, has no application here. The Board accepted the remand in *Hendricks I* and expressly applied to the particular facts the broad standard articulated in that decision as "the law of th[e] case" (Pet. App. 19a). Similarly, there is no merit to Hendricks' suggestion that the court of appeals " 'did no more by [its] second judgment than to restate what it had decided by the first one' " (Br. in Opp. 8; citation omitted). As we have shown, the court in *Hendricks II* determined that the record evidence required Mary Weatherman's exclusion from the Act (Pet. App. 6a-8a), a question which the court expressly left open in *Hendricks I* (*id.* at 31a). Compare *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952) (review appropriate where court's second judgment modified in relevant part terms of first judgment).[2] Finally, it is true

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[2]Contrast *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), where the second judgment did not alter the first in *any* relevant respect. In that case, the FTC issued an order remedying separate violations of the Robinson-Patman Act, 15 U.S.C. 13(a), the Federal Trade Commission Act, 15 U.S.C. 45, and the Clayton Act, 15 U.S.C. 14. The court of appeals entered a judgment setting aside the Robinson-Patman portion of the order, and, subsequently, the agency moved to amend the judgment to reflect enforcement of the other portions of the order. The court of appeals amended the judgment accordingly, but simply restated the prior judgment with respect to the Robinson-Patman issue. The agency sought certiorari on that issue within 90 days of entry of the amended judgment, but more than five months after the court had issued the first judgment. 344 U.S. at 207-210. This Court dismissed the petition, holding that "the mere fact that [the] judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought." *Id.* at 211.

that the legal issue presented here was resolved in *Hendricks I*, and left undisturbed in *Hendricks II*, but review of this issue is nevertheless appropriate now because Hendricks' liability under the Board's reinstatement and backpay order was "inextricably linked with the [evidentiary issue,] which was not determined until the [second] judgment." *United States* v. *Adams*, 383 U.S. 39, 41-42 (1966) (distinguishing *Minneapolis-Honeywell*, discussed *supra*, note 2, as involving separate judgments on substantively unrelated issues).

For these reasons, and the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-885
80-1103

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MALLEABLE IRON RANGE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE FOR THE UAW AS AMICUS CURIAE

The UAW respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the position of the petitioner in these cases.

While the UAW has been able to secure the written consent of the NLRB and Malleable Iron Range Co., it has been unable to contact counsel for Hendricks County Rural Electric Membership Corporation.

INTEREST OF THE AMICUS CURIAE

The UAW, which represents some 1,250,000 employees, is one of the largest industrial unions in this country with nearly 3000 collective bargaining agreements. Included in its membership are approximately 80,000 technical office and professional employees.

The UAW is vitally interested in the standard applied by the NLRB to determine whether or not an employee is to be excluded as a "confidential employee" from the protection of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (hereinafter the "Act"). Any change in the traditional NLRB test for confidential status could adversely affect the composition of hundreds of UAW bargaining units, in both the blue and white collar industries. The UAW is also actively engaged in clerical organizing campaigns which could suffer a significant set-back due to lengthy litigation and industrial strife if the respondents prevail.

CONCLUSION

For the foregoing reasons we request that the present motion to file this brief amicus curiae be granted.

Respectfully submitted,

JOHN A. FILLION
General Counsel
LEONARD PAGE
Associate General Counsel
JUDITH SCOTT
Assistant General Counsel
8000 E. Jefferson
Detroit, Michigan 48214
Attorneys for UAW

May 16, 1981

IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE UAW AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file. The interest of the UAW in these cases is set forth in that motion.

ARGUMENT

For over twenty-five(25) years, the National Labor Relations Board (NLRB) has applied the same legal test to determine whether or not an individual should be excluded from its jurisdiction as a "confidential employee." This test, enunciated in *B.F. Goodrich*, 115 N.L.R.B. 722 (1956) restricts the confidential employee status to those who "assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." 115 N.L.R.B. 722 at 724. In these cases the Seventh Circuit rejected this narrow, crafted approach. The Court of Appeals adopts, instead, a broad standard which encompasses anyone who is given information by the employer "that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer." *Hendricks County Rural Electric Membership Corporation v. NLRB*, 603 F. 2d 25, 30 (7th Cir. 1979), *quoting* H.R. 3020 § 2(12)(C), 80th Cong., 1st Sess. (1947).

The UAW supports the NLRB's definition of a "confidential employee" and the statutory analysis on which its conclusion rests. This brief *amicus curiae* is submitted to demonstrate the important, practical consequences which hang on the choice between the NLRB's and the Seventh Circuit's test. .

The NLRB standard offers a "bright line" against which an employee's duties can be readily evaluated.[1] *Only if* the individual's job responsibilities involve the realm of labor relations, will the employee become the focus for an intensive look into potential confidential status.

---

[1] See Justice Powell's concurring opinion in *Ford Motor Co. v. NLRB*, 441 U.S. 488, 504 (1979).

The Seventh Circuit, on the other hand, advances a test which invites, nay, requires, diffuse inquiry into an employee's job and, worse, offers no clear measure for the result.

The Circuit's test threatens bargaining units, though already established, with industrial strife and litigation.[2] Is a nurse who has access to confidential employee medical records a "confidential employee"? Is a factory clerk, who has access to customer orders, a "confidential employee" simply because that information must be kept from competitors? Is the production worker employed by an aerospace company a "confidential employee" because he or she works on a defense contract and builds a new secret missile? What about the 1700-1800 production workers at Rockwell International who built the 1981 Space Shuttle Orbiter? What of the technical employees, such as stylists and clay modelers, assigned to the engineering divisions, working with crucial, secret plans for new car models which are designed five (5) years in advance of production? Are the test drivers at the secluded auto proving grounds "confidential" as well?

All of these employees handle information which employers would rightfully maintain must be kept secret from groups of other employees, competitors, and the public at large. All of the above jobs are included in one or more long standing bargaining units.[3]

---

[2] Armed with the Seventh Circuit's new standard, employers could resurrect the issue of the confidential status of certain employees by refusing to bargain about these classifications in contract negotiations. Unions would then be forced to agree to reduce their membership, pursue unfair labor practice charges and/or strike.

[3] For example, for approximately 10 years, the UAW has represented the clay modelers (industrial sculptors) and stylists at American Motors Corporation. Since 1968 Chrysler Corp. industrial nurses have also been organized by the UAW. The UAW unit of Rockwell production workers in the Los Angeles, California area dates back at least 30 years.

As these examples illustrate, access to confidential information has not obstructed the course of labor relations between the unions and employers involved. As in an unorganized workplace, employers can, and have, easily developed safeguards to protect themselves against abuse of this confidential information. Labor arbitration precedent has upheld disloyalty and/or disclosure of confidential information as just cause for discipline and discharge.[4] Many companies require job applicants to sign a no conflict-of-interest and confidential pledge as a condition of employment.[5] These agreements can be enforced against the employee in a civil action. *See, Snepp v. United States*, 444 U.S. 507 (1980). In the aerospace industry, the employer relies on a security clearance program which involves a more detailed screening of a new hire's personal history than normally conducted.[6] Disclosure of certain defense information may also lead to criminal sanctions against the responsible employee. 18 U.S.C. § 789. Finally, the NLRB refuses to extend the Act's protection to employees who disclose confidential business information or secrets. *E.g., W.R. Grace Company*, 240 NLRB No. 117 (1979); *Bell Federal Savings*, 214 NLRB 75, 78 (1974); *Ridgely Manufacturing Co.*, 207 NLRB 193, 196 (1973).

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[4] *E.g. Factory Services Inc.*, 70 LA 1088 (1978); *Southern Bell Telephone & Telegraph Co.*, 69 LA 582 (1977); *William Feather Co.*, 68 LA 13 (1977); *Dispatch Services Inc.*, 67 LA 632 (1976); *Moore Business Forms, Inc.*, 57 LA 1258 (1971); *Pipe Coupling Manufacturers, Inc.*, 46 LA 1009 (1966); *Ravens-Metal Products, Inc.*, 39 LA 404 (1962); *Firestone Retread Shop*, 38 LA 600 (1962).

[5] For example, at Chrysler Corp. certain prospective employees in The UAW unit must sign a form entitled "Patent Release Form." At Martin-Marietta, UAW members are asked to sign an "Employee Patent and Confidential Information Agreement."

[6] At the UAW bargaining unit at Rockwell, different levels of security clearance apply to different UAW bargaining unit positions, depending on the degree of secrecy desired.

With modern technological developments, the plants of industrial America, not just its corporate offices, are rapidly becoming the repository of trade secrets. The vague "confidential employee" test proposed by the Seventh Circuit would result in wholesale exclusion of rank-and-file workers, quite remote from management and its functions. Such a result conflicts with the legislative history cited in *NLRB v. Bell Aerospace Company, Division of Textron Inc.*, 416 U.S. 267, 283 (1974):

> Most of the people who would qualify as 'confidential' employees are executives and are excluded from the act in any event."
> [quoting H.R. Report No. 245, p. 23]

Where a wide range of devices and legal remedies is available to protect an employer's legitimate business interest in confidentiality, it should not be necessary to take the drastic approach of excluding workers from coverage under the Act. *See generally, Complete Auto Transit Inc. v. Reis*, —— U.S. ——, 49 U.S.L.W. 4473, 4477 n.18 (1981).

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted,

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May 16, 1981

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No. 80-885

IN THE

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NATIONAL LABOR RELATIONS BOARD,
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MALLEABLE IRON RANGE COMPANY

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF ON BEHALF OF OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC AS AMICUS CURIAE

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IN THE

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF ON BEHALF OF OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC AS AMICUS CURIAE

STATEMENT OF INTEREST

The Office and Professional Employees International Union, AFL-CIO, CLC, is an international labor organization representing white collar and other employees engaged in office, clerical, professional, semi-professional, technical, and administrative work. Collective bargaining agreements covering the wages, hours, and working conditions of these employees are negotiated and consummated in most, but not all, situations by local unions chartered by the International

Union. OPEIU Local 39, the petitioner before the National Labor Relations Board in Case No. 30-CA-5206, and the charging party that initiated the proceeding in *Malleable Iron Range Company*, is one of these local unions, and is most directly affected by the instant proceeding. The International Union is vitally concerned with the issues in this case as it affects its entire membership, from the kind of secretary involved in *Hendricks County Rural Electric Membership Corporation* to all employees who do work which may be considered by their employers as confidential.

Consent to the filing of this brief amicus curiae has been obtained from the other parties involved, and such written consents are on file in the Clerk's office.

The Office and Professional Employees International Union has filed this brief *amicus curiae* in support of the petition for writ of certiorari filed by the National Labor Relations Board, and hereby urges that such petition be granted.

REASONS WHY THE PETITION SHOULD BE GRANTED

1. The Issues in This Case Are of Fundamental Public Importance to Employers and to All Employees in the United States Who May Do Work Considered by their Employers to Be Confidential

Employees in white collar job occupations or employees whose work is identified as office, clerical, professional, semi-professional, technical, and administrative make up a substantial and important segment of the American work force. It is well known that employees in these fields of work are increasing in

number as compared to the number of employees engaged in other endeavors, and their numbers are expected to comprise an increasingly important portion of the work force in the future.

In addition to the Office and Professional Employees International Union, AFL-CIO, whose primary work jurisdiction deals with office, clerical, professional, semi-professional, technical, and administrative employees, it is well known that many other labor organizations also represent substantial membership in these occupational areas.

Representation of employees in these occupational areas by the Office and Professional Employees International Union and its local unions has been achieved primarily through proceedings brought before the National Labor Relations Board under the labor statute. The instant case involving Malleable Iron Range Company and OPEIU Local 39 is a typical example. The Board's prior legal standard on what constitutes a confidential employee has been utilized as an organizational and collective bargaining guideline throughout the history of the OPEIU from its initial chartering in 1945 to the present time. Furthermore, this Board standard, framed as it has been within its labor relations nexus, has been well understood by employers, labor organizations, and employees until the decisions in the court below.

The decisions below, if allowed to stand, are likely to bring industrial relations chaos to an area that has been stable and successful until the present time. They will seriously interfere with the national labor policy of industrial peace.

This is so because almost all office, clerical, professional, semi-professional, technical, and administrative employees, in some degree or another, work with, or have access to, information that their employers would likely consider as confidential, in that its contents would not be made available to the general public, to competitors, to regulatory agencies where applicable, and to those persons not specifically authorized to receive such information. Examples of the disruption that is likely to occur if the decisions of the Court of Appeals below are allowed to stand are shown in the attached affidavit and exhibits.

1. The collective bargaining agreement between the Admiral Corporation, Galesburg, Ill., and OPEIU Local 444 contains the job classification of secretary, a job that was involved in Hendricks County Rural Electric Membership Corporation. Under the ruling below, secretaries in most instances would no longer be entitled to representation by unions under the Act and to be protected by collective bargaining agreements.

2. The collective bargaining agreement between General Dynamics Corporation, Fort Worth, Tex., and OPEIU Local 278 provides in Art. I, Sec. 2 thereof for the coverage of employees as previously certified by the National Labor Relations Board, except for "confidential employees who customarily assist management representatives in the handling of labor relations matters." This is accordance with the legal standard adopted by the NLRB.

3. The collective bargaining agreement between Consolidated Freightways, Portland, Ore., and OPEIU Local 11 provides for a contractual exception for "those employees in positions which are exempt or which will become exempt under any Federal statute, or the inter-

pretation thereof by a court or agency of competent jurisdiction." The ruling below, if allowed to stand, would likely disrupt this established contractual relationship.

4. The collective bargaining agreement between Group Health Association, Washington, D.C., and OPEIU Local 2, involves employees employed by a health care institution. One can hardly imagine any record more confidential than that of medical patients. One does not have to engage in supposition to understand that unionized employees of Group Health Association deal with the medical records of patients each and every day as a part of their ordinary work activity. The broad interpretation of "confidential" by the Court of Appeals below might well destroy collective bargaining in the health care industry only a short time after Congress wrote specific provisions into the Act to extend its coverage to health care institutions.

Both the public importance and the drastic consequences of the decisions below were recognized by Judge Cudahy in his dissenting opinions below. In *Hendricks County* (App. 12a), he wrote:

> To paint with a broad brush about the purported exclusion of "confidential" employees (other than those having the well-accepted "labor nexus") from the protection of the Act may be to strike a major blow at white collar unionism. Many, *if not most* (emphasis by Judge Cudahy), white collar workers are involved in something which may be argued to be "confidential" in some general sense. There are matters of credit, costs, of designs, of customer

lists, of prices, of medical records — the list is endless.

In *Malleable Iron Range*, Judge Cudahy said (App. 60a):

> I fear that the application of the majority's new test for excluded "confidential employees" may demonstrate both its lopsidedness in principle and its potentially sweeping impact on the statutory protection, particularly of white collar workers. See *Union Oil Company of California* v. *NLRB*, 607 F. 2d 852, 853 (9th Cir., 1979).

The Labor Board itself, in an opinion released after the Seventh Circuit rulings in these cases, has just completed a review of the confidential issue and has reiterated the sweeping public importance of this matter. *Kleinberg, Kaplan, Wolff, Cohen, & Burroughs, P.C.*, 253 NLRB No. 54, 105 LRRM 1611 (Nov. 21. 1980). Not only does its thorough review of the legislative history of the 1947 amendments to the statute establish that it was never the intention of Congress to exclude from coverage of the Act the type of confidentials found by the Court below, but it pointed out that such a result would be so "revolutionary" that Congress could not have intended it.

At 105 LRRM 1611, 1617, it said:

> Clearly, such a definition would vitiate collective organization by large numbers of both white- and blue-collar employees already organized, since many, in the normal course of their duties, have access to such information. Moreover, the future impact of this broader standard would be incalculable. The Bureau of Labor Statistics has projected that, by 1990, the economy will have created nearly 20 million new jobs, well over half of which will be in white-collar occupations. In the white-collar

category, clerical employees, which includes bank tellers, bookkeepers, cashiers, secretaries, and typists, are the fastest growing group. U. S. Department of Labor Statistics, News Bulletin 79 - 903 (December 27, 1979). Many of these new workers would have access to confidential information in the broader sense. As a consequence in future years a rapidly growing percentage of workers in the work force would be deprived of rights under the Act. If Congress intended such a result so revolutionary, we believe that it would have said so expressly, Cf. *Bell Aerospace*, 416 U.S. at 284-285, fn. 13.

While alarm at the vast scope of the potential consequences of decisions below may induce toward hyperbole, it may be safely said that it would be difficult indeed to conceive of any appellate court labor ruling in the past quarter century that has such public importance, simply because these decisions can affect so many, can deprive so many, can deny so many in the future, and can obliterate so many past established collective bargaining relationships.

2. The Decisions Below Conflict With Other Courts of Appeals Decisions, Particularly With the More Recent Ninth Circuit Ruling Approving the Board's Standard

While the petition filed on behalf of the NLRB does set forth a conflict in decisions betweeen courts of appeals, particular note should be taken of the holding of the Ninth Circuit in *Union Oil Company of California* v. *NLRB*, 607 F. 2d 852 (9th Cir., 1979), referred to also in the dissenting opinion of Judge Cudahy in *Hendricks County* below.

The clear conflict between circuits is another reason why the writ should be granted in this case.

3. Fundamental Confusion from this Court's Holding in Bell Aerospace Requires Clarification and Distinction in these Proceedings

It is apparent from reading the opinions of the Court below that it has either seriously misperceived the thrust of this Court's holding in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), or else the National Labor Relations Board, Judge Cudahy, and the Ninth Circuit have seriously misperceived it. Even while the petition in this case is pending, the OPEIU, as a labor organization vitally concerned, waits with apprehension for another shoe to drop when some other appellate court may extend the holding of *Bell Aerospace*, or misapply it, or glean some new interpretation of it, as the court below has apparently done.

One may readily argue that this Court never intended to hand down legal guidelines beyond those applying to managerials. But judges of the Court of Appeals for the Seventh Circuit have construed *Bell Aerospace* otherwise. Only a definitive ruling by this Court can provide correct guidance for the future.

The writ should be granted.

Respectfully submitted,

JOSEPH E. FINLEY
57 Brookstone Drive
Princeton, N. J. 08540

Attorney for Office and Professional Employees International Union, AFL-CIO CLC

EXHIBITS

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

No. 80-885

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION and
NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

MALLEABLE IRON RANGE COMPANY

STATE OF NEW JERSEY
COUNTY OF MERCER

AFFIDAVIT OF JOSEPH E. FINLEY

JOSEPH E. FINLEY, being first duly sworn, deposes and says:

1. I am a member of the bar of this Court and have been so continuously since 1954.

2. I am general counsel for the Office and Professional Employees International Union, AFL-CIO, CLC, and have been so continuously since 1955. As general counsel, I am familiar with all of the legal work involving the International Union and am especially familiar with many of the collective bargaining contracts entered into between employers and local unions of the International Union. Many of these agreements are kept in my files in the regular course of business of representing both the International Union and many of its local unions.

3. The Office and Professional Employees International Union, hereinafter referred to as the OPEIU, which was initially chartered in 1945 by the American Federation of Labor, has grown continuously in size until in 1981, it has approximately 120,000 members and ranks in membership

size among the top one-third of all international unions affiliated with the AFL-CIO. It believes it is the major labor organization in the United States engaged in the representation of office, clerical, professional, semi-professional, technical, and administrative employees.

4. Attached to this affidavid as exhibits are portions of collective bargaining contracts entered into between local unions of the OPEIU and employers in various parts of the United States. These agreements were either contained in my own business files or were supplied to me through the OPEIU.

5. I am personally familiar, through my more than a quarter century of representing the OPEIU, with the composition and scope of most of the collective bargaining units represented by local unions of the OPEIU and with the kind of work performed by employees in these units. Almost all of the office, clerical, professional, semi-professional, technical, and administrative work performed by these employees, in one degree or another, involves access to information that employers would not want made available to the public in general, to competitors, to regulatory agencies, where pertinent, and to unauthorized persons.

/s/ JOSEPH E. FINLEY

Subscribed and sworn to before me this 12th day of January 1981

/s/ MARIE G. BAHR

Notary Public
Marie G. Bahr
Notary Public of New Jersey
My Commission Expires
June 14, 1982

Exhibit A to
Affidavit of Joseph E. Finley

This is the cover page and one page taken from a collective bargaining contract between Admiral Corporation and Office and Professional Employees International Union, Local 444, in Galesburg, Ill. In Labor Grade 3, there is contained the job classification of Secretary. Others listed are illustrative of some of the other jobs.

1976 - 1979

AGREEMENT

Between

Admiral
Corporation

AND

Office and Professional
Employees International
Union
AFL-CIO
Local 444

GALESBURG, ILLINOIS

APPENDIX D

OFFICE JOB CLASSIFICATIONS

GRADE 1:
Clerk Typist

GRADE 2:
**Draftsman Trainee
Keypunch Operator
Personnel Clerk
Print Room Operator
Secretary-Stenographer
Specifications Technician Jr.
Switchboard Operator
Traffic-Clerk Typist

GRADE 3:
Billing Clerk
Bill of Material Coordinator
Clerk-Non Pro Stores
Expeditor Internal
General Lab Helper
Insurance Clerk
Multilith Operator
Secretary
Senior Clerk
Telecontrol Operator
Senior Personnel Clerk
Accounts Payable Expeditor
Order Clerk
Warehouse Clerk

GRADE 4:
Material Coordinator
Offline Equipment Operator
Payroll Clerk
Schedule Clerk
Service Department Clerk
Specification Clerk
Test Calculator
Traffic Clerk

Exhibit B to
Affidavit of Joseph E. Finley

This is the inside cover page and the first page of an agreement between General Dynamics Corporation, Fort Worth, Texas, and Office and Professional Employees International Union Local 277. The underlining is by affiant.

AGREEMENT

BETWEEN

GENERAL DYNAMICS CORPORATION
FORT WORTH DIVISION

AND

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL NO. 277
AFL-CIO

EFFECTIVE
30 OCTOBER 1978

PREAMBLE

The purpose of this Agreement is to establish harmonious relations between the parties and to facilitate orderly adjustment of grievances, complaints, and disputes which may arise from time to time between the Company and the Union. This Agreement is entered into in consideration of the mutual performance thereof in good faith by the parties.

This Agreement made and entered into this 30th day of October 1978 by and between GENERAL DYNAMICS CORPORATION, Fort Worth Division, hereinafter called the "Company" and the OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 277, AFL-CIO, hereinafter called the "Union."

ARTICLE I

RECOGNITION

Section 1. The Company recognizes the Union as the exclusive collective bargaining representative of all employes in the "office and clerical" unit as agreed to in the Consent Election Agreement entered into by the parties June 1, 1951, in the National Labor Relations Board Case No. 16-RC-731, and all employes in the "photography" unit as agreed to in the Consent Election Agreement entered into by the parties May 5, 1966, in the National Labor Relations Board Case No. 16-RC-4278.

Section 2. For purposes of this Agreement, the terms "employe" and "employes" shall include, but without limitation thereby, all persons in the employ of the Company classified on job classifications listed in Appendix "A" attached hereto, except for confidential employes who customarily assist management representatives in the handling of labor relations matters.

ARTICLE II

UNION SECURITY

Section 1. Membership in the Union is not compulsory. Employes have the right to join, not join, maintain, or drop their membership in the Union as they see fit. Neither party shall exert any pressure on or discriminate against an employe as regards such matters.

Exhibit C to
Affidavit of Joseph E. Finley (first page)

This is the cover page of the agreement between Consolidated Freightways Corporation, Portland, Oregon, and Office and Professional Employees International Union Local 11, Portland, Ore.

WORKING AGREEMENT

BETWEEN

AND

OFFICE & PROFESSIONAL

EMPLOYEES UNION

LOCAL No. 11

FOR THE PERIOD OF

OCTOBER 1, 1979 thru SEPTEMBER 30, 1982

Exhibit C to
Affidavit of Joseph E. Finley (page 2)

This is the first page of the collective bargaining agreement between Consolidated Freightways, Portland, Ore., and OPEIU Local 11. The underlining is by affiant.

AGREEMENT

THIS AGREEMENT, made and entered into this first day of October, 1979 by and between CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, for itself, their successors and assigns, where the Union has been certified as the collective bargaining agent in the states of Oregon and Montana, and in Longview, Washington, hereinafter referred to as "Employer," and the OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 11, a local union chartered by the Office & Professional Employees International Union, AFL-CIO, hereinafter referred to as the "OPEIU" or as the "Union."

1.0
RECOGNITION

Application of Agreement

1.1 The Employer agrees to recognize the Union as the sole collective bargaining agent for the bargaining unit composed of all office and clerical employees employed by the Employer within the states of Oregon and Montana, and at the Employer's terminal in Longview, Washington, with the exception of those employees in positions which are exempt or which will become exempt under any Federal statute, or the interpretation thereof by a court or agency of competent jurisdiction. The Company and the Union may, during the life of this Agreement, mutually agree to exclude from the bargaining unit other positions and/or employees who are not exempt or excluded, or may include in said bargaining unit positions and/or employees which have heretofore been excluded.

Change of Status

1.2 The provisions of this Agreement shall be binding upon the Union and the Company, and all the terms and obligations herein contained shall not be affected or changed in any respect by the consolidation, merger, sale, transfer, assignment, or by any change in the legal status, ownership, corporate structure, or management of the Company.

Additional Locations

1.3 In the event the Employer opens a new office facility employing office or clerical employees (other than exempt employees) in Oregon, Montana, or Longview, Washington, the Union shall be so notified and if the employees at such new facility certify the Union as the exclusive collective bargaining representative as a result of Employer recognition of a majority of authorization cards, the Employer and the Union shall thereafter enter into negotiations concerning wages, hours, and working conditions at such newly opened office facility.

Exhibit D to
Affidavit of Joseph E. Finley

This is a copy of the cover page and the first page of an agreement between Group Health Association of Washington, D.C., and Office and Professional Employees International Union Local 2, of Washington, D.C. Group Health Association is a health care agency providing medical services to members in the District of Columbia, Maryland, and Virginia.

COLLECTIVE BARGAINING AGREEMENT

by and between

GROUP HEALTH ASSOCIATION, INCORPORATED

and

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 2

Term of Agreement

November 1, 1978

to

October 31, 1980

A G R E E M E N T

THIS AGREEMENT, made as of _____, 1978 by and between GROUP HEALTH ASSOCIATION, INC. (hereinafter called "GHA") and OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 2 (hereinafter called "the Union").

W I T N E S S E T H:

The parties recognize Group Health Association's special s atus as a health care institution. Each bargaining unit member shall use his best efforts and skills to furnish in the best manner practicable the highest quality of health care services required to be rendered to GHA members.

ARTICLE 1

RECOGNITION AND CHECKOFF

§1.1 RECOGNITION: Pursuant to a certification by the National Labor Relations Board in Case No. 5-RC-7219, GHA recognizes the Union as the sole and exclusive bargaining agent with respect to rates of pay, hours of work and other conditions of employment for the following unit of its employees:

> All office and technical employees employed by GHA, excluding all maintenance employees, casual employees, regular part-time employees working less than twenty (20) hours a week, confidential employees, professional employees,

Office-Supreme Court, U.S.
FILED
MAY 8 1981
ALEXANDER L. STEVAS, CLERK

Nos. 80-885 and 80-1103

In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER
v.
HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION
and
MALLEABLE IRON RANGE COMPANY

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTIONS PRESENTED

1. Whether the Board properly concluded that nonmanagerial "confidential employees" are entitled to the full protection of the National Labor Relations Act unless they assist and act in a confidential capacity to officials who formulate, effectuate, and determine labor relations policies, or regularly have access to information concerning anticipated changes that may result from collective-bargaining negotiations, in which case they may not participate in bargaining units comprised of other employees.

2. Whether the court of appeals properly concluded that Hendricks employee Mary Weatherman was not a "personnel department employee."

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-885

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

and

MALLEABLE IRON RANGE COMPANY

No. 80-1103

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals in *Hendricks* (Pet. App. 1a-13a)[1] is reported at 627 F.2d 766. The supple-

[1] "Pet. App." refers to the appendix to the petition in No. 80-885. "A." refers to the joint appendix filed in this Court. "Tr." refers

mental decision and order of the National Labor Relations Board (Pet. App. 16a-21a), on prior remand from the court of appeals, are reported at 247 N.L.R.B. No. 68. The prior opinion of the court of appeals (Pet. App. 22a-32a), remanding the case to the Board, is reported at 603 F.2d 25. The Board's original decision and order (Pet. App. 33a-55a) are reported at 236 N.L.R.B. 1616.

The opinion of the court of appeals in *Malleable* (Pet. App. 56a-60a) is not reported. The decision and order of the Board (Pet. App. 62a-75a) are reported at 244 N.L.R.B. No. 64. The Regional Director's decision and direction of election in the underlying representation proceeding (Pet. App. 76a-94a) are not reported.

JURISDICTION

The judgment of the court of appeals in *Hendricks* (Pet. App. 14a-15a) and the judgment of the court of appeals in *Malleable* (*id.* at 61a) were entered on July 21, 1980. On October 8, 1980, Justice Stevens extended the time for filing the petition for a writ of certiorari to and including November 18, 1980, and, on November 10, 1980, Justice Stevens further extended the time for filing the petition to and including December 2, 1980. The Board's petition for a writ of certiorari in No. 80-885 was filed on December 1, 1980. Hendricks' cross-petition for a writ of certiorari in No. 80-1103 was filed on January 3, 1981, and both petitions were granted on March 2, 1981 (A. 81, 82). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

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to the transcript of the administrative proceedings in *Malleable*, which is part of the original record that has been lodged with the Court. "*Legis. Hist.*" refers to NLRB, *Legislative History of the Labor Management Relations Act* (1947). "*Senate Hearings*" refers to *Labor Relations Program: Hearings on S. 55 and S.J. Res. 22 Before the Senate Comm. on Labor and Public Welfare*, 80th Cong., 1st Sess. (1947). "*House Hearings*" refers to *Amendments to the National Labor Relations Act: Hearings on H.R. 8, H.R. 725, H.R. 880, H.R. 1095, and H.R. 1096 Before the House Comm. on Education and Labor*, 80th Cong., 1st Sess. (1947).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth in the Appendix to this brief.

STATEMENT

A. Hendricks

1. On May 9, 1977, Wallace E. Dillon, the general manager of Hendricks County Rural Electric Membership Corporation, Danville, Indiana, discharged his secretary, Mary Weatherman, because she had signed a petition calling for the reinstatement of Lloyd Hadley, a close friend and fellow employee, who had lost an arm while at work.[2] Weatherman subsequently filed with the National Labor Relations Board an unfair labor practice charge, in which she alleged that the discharge violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). Hendricks defended against the charge by claiming, among other things, that Weatherman was excluded from coverage under the Act because her duties were allegedly those of a "confidential secretary" and a "personnel department employee." Based on the Board's definition of "confidential employees" as "employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations" (*B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956)), the administrative law judge rejected Hendricks' contention (Pet. App. 43a-49a). The ALJ found that Dillon had minimal responsibility for labor relations matters and

[2] Hadley became disabled in February 1976. In March 1977, he sought reemployment with Hendricks, but his application was denied. Subsequently, Weatherman and 25 other employees signed a petition that was addressed to the company's board of directors and urged reconsideration of this decision. When Dillon learned that the petition had been signed by Weatherman, an employee of nine years' standing, she was immediately discharged. Pet. App. 38a-43a.

that Weatherman had no responsibility for assisting Dillon in this area.

The ALJ found (Pet. App. 47a) that Dillon played a "most passive role in labor and employee relations matters." Indeed, Dillon testified (*id.* at 46a n.10, 47a; A. 23, 25-26) that he did not participate in the formulation of Hendricks' labor relations policies, that he had "very little" to do with union negotiations,[3] that he had "no" function whatsoever in "interpreting the labor contracts and labor relations among employees," and that he had only tangential responsibility with respect to other employee "problems."

The ALJ also found (Pet. App. 45a) that "the range of [Weatherman's own] duties was deliberately restricted so as to preclude her" from acting in a "confidential capacity" to Dillon with respect to the few labor relations matters that he did handle. For example, although Weatherman was generally responsible for opening the incoming mail, union-related correspondence from Hendricks' attorneys was removed by the office manager before it reached Weatherman's desk (Pet. App. 45a; A. 14-15). Similarly, status reports concerning ongoing labor negotiations were hand-delivered to Dillon by Hendricks' attorneys, and Weatherman had no duties relating to such reports, which Dillon personally filed (Pet. App. 47a & n.13; A. 29-32). Weatherman placed few of Dillon's telephone calls; she was not generally privy to the content of his telephone or other conversations; and she did not keep track of his appointments (Pet. App. 45a; A. 9-12, 18). Although Weatherman typed Dillon's correspondence, the only labor-related matter involved in this task was to notify Hendricks' attorneys when union negotiating meetings would be held, which occurred only every few years (Pet. App. 46a; A. 11,

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[3] The International Brotherhood of Electrical Workers represented Hendricks' 25 non-clerical employees. Weatherman and nine other clerical employees were not represented by any labor organization. Pet. App. 38a n.2; A. 4, 5.

14). Weatherman did not attend management or directors' meetings,[4] and, although she was responsible for typing the minutes of directors' meetings (from drafts prepared by counsel), the ALJ specifically found that these documents should not be deemed "confidential" simply because they contained "occasional[]" references to personnel matters. (Pet. App. 46a-47a; A. 12.) As the ALJ noted (Pet. App. 46a), Hendricks is a cooperative, and its members (including employees) are entitled to inspect the minutes.[5] Indeed, Dillon conceded (Pet. App. 46a n.12; A. 26-27, 29-32) that Hendricks had no secret documents.

The ALJ also found that Weatherman typed no internal memoranda concerning labor policies, that she was never involved in labor negotiations or grievances, and that she had nothing to do with employee discipline or reward (Pet. App. 46a; A. 16-18). Weatherman's only personnel-related work was to assist Dillon in the formal processing of employee medical and disability insurance claims. In connection with these claims, and for her own convenience (without instruction from Dillon), she maintained informal files that were destroyed or returned to the claimants after final disposition of the claims. Pet. App. 45a; A. 11, 14, 15-16.

Having determined that Weatherman was not a "confidential employee" for purposes of the Act,[6] the ALJ further found (Pet. App. 41a-43a, 49a-51a) that Weather-

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[4] In preparation for the annual meeting, however, Weatherman generally met briefly with the board "for the purpose of getting together who was going to do what, who was going to set up chairs at the annual meeting, who was going to order sandwiches and so forth like this" (A. 18). Otherwise, she was never present at directors' meetings (Pet. App. 46a; A. 18).

[5] Moreover, the ALJ noted that "the Board has held that occasional typing of material relating to personnel problems does not render an employee confidential in nature."

[6] The ALJ also noted (Pet. App. 44a) that even if he had found Weatherman to be a "confidential employee," that fact would bear only upon her eligibility to participate in a bargaining unit com-

man had been discharged for engaging in concerted activity protected by Section 7 of the Act, 29 U.S.C. 157, and that Hendricks had thus violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1). The Board affirmed the ALJ's decision and ordered that Weatherman be reinstated with back pay (Pet. App. 33a-35a, 53a-55a).

2. The court of appeals sustained the Board's finding that Weatherman had been discharged for engaging in protected activity (Pet. App. 24a). Likewise, the court agreed that Weatherman "did not act in a 'confidential capacity' to Dillon in any meaningful sense with respect to [Hendricks'] labor relations policies," and that her limited duties with respect to such matters did not make her the "equivalent" of a "personnel department employee" (*id.* at 27a).[7] Based on its understanding of this Court's decision in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), however, the court of appeals held that "*all* secretaries working in a confidential capacity, without regard to labor relations, [must] be excluded from the Act" (Pet. App. 31a; emphasis in original). Thus, the court held that the Board's application of the "labor relations nexus" test was an "error of law" and remanded the case to the Board to determine whether, " 'by the nature of [her] duties[,]' " Weatherman was " 'given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer' " (*id.* at 27a, 31a; citation omitted).[8]

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posed of other employees, not upon her right to complain of an unfair labor practice such as that involved here. See pages 17-18 & note 14, 41-43, *infra*.

[7] The court also sustained (Pet. App. 24a n.1) the Board's finding (*id.* at 52a-53a) that Hendricks had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by coercively interrogating another employee concerning the protected activities.

[8] Judge Bonsal, sitting by designation, dissented on the need for a remand, stating that he would enforce the Board's order because the record satisfied him "that Mary Weatherman was not a 'confidential secretary' and was covered by the Act" (Pet. App. 32a).

3. On remand, the Board accepted the standard enunciated by the court of appeals as "the law of this case only" (Pet. App. 18a-19a). Applying that standard, the Board again determined that Weatherman was not a "confidential secretary" and reaffirmed its original order. The Board stated (*id.* at 20a):

> [F]or Weatherman to qualify as a confidential employee under the standard erected by the court, the record would have to disclose that she performed confidential duties in connection with nonlabor relations or personnel areas. Quite clearly, however, the evidence taken at the hearing contains no hint that Weatherman had any such responsibilities.[9] That this was not merely an oversight in the course of litigation is confirmed by Dillon's statement that [Hendricks] simply did not have secret papers or documents.

4. By divided vote, the court of appeals denied enforcement (Pet. App. 6a-8a). The court reaffirmed its earlier holding that this Court's decision in *Bell Aerospace Co.* required the rejection of the Board's traditional "labor nexus" test and compelled the conclusion that all "confidential employees" are excluded from the Act. Although the court acknowledged (Pet. App. 3a-4a) that *Bell Aerospace Co.* held only that "all employees properly

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[9] Specifically, the Board again noted (Pet. App. 19a) that Weatherman generally did not place Dillon's telephone calls, that she did not keep track of his appointments, and that she did not attend meetings of management or the board of directors. The Board further noted (*id.* at 19a-20a & n.8) that there was no evidence that the letters Weatherman typed concerned confidential matters of any description, and, although Weatherman typed the minutes of directors' meetings, those documents could not be considered confidential in light of the cooperative members' access to them. Finally, the Board observed (*id.* at 19a & n.7) that certain significant incoming communications—the contents of which Dillon "prefer[red]" to keep private (A. 30)—never crossed Weatherman's desk.

classified as 'managerial,' rather than just those [managerial personnel] in positions susceptible to conflicts of interest in labor relations," are excluded from the Act, the court of appeals noted that this Court, in reaching that conclusion, had relied at least in part upon the premise "that 'confidential employees' were excluded from coverage under a 'broad definition' not limited to those having a labor nexus." The court of appeals then held that the Board's finding that Weatherman was not a "confidential employee," under the broad standard articulated in the court's prior decision, was not supported by substantial evidence on the record as a whole. The court noted (Pet. App. 8a) that the Board, in reaching its conclusion, had relied (*id.* at 20a) upon Dillon's testimony that Hendricks "simply did not have secret papers or documents." Giving a narrower construction to the evidence, however, the court found (*id.* at 8a; emphasis in original) that Dillon had testified only that the cooperative "had 'nothing to hide from the *members*.'" The court concluded (*ibid.*):

> That a company has no secrets from its members does not mean that it does not have matters or documents which are confidential insofar as its nonconfidential employees are concerned, insofar as its competitors are concerned, insofar as regulatory agencies are concerned, and insofar as the public is concerned.

Judge Cudahy dissented. He noted at the outset that, in light of the court's prior decision in this case, the exclusion of "a confidential *secretary* * * * from the protection of the Labor Act (whether or not the confidences are labor relations-related) * * * is, for better or for worse, the present law of this Circuit" (Pet. App. 9a; emphasis in original; footnote omitted). However, Judge Cudahy found "abundant evidence in the record to support the Board's conclusion that Weatherman is not properly classified as a confidential secretary" (*id.* at

9a-10a).[10] Moreover, he noted that there was no authority to support the majority's broader holding that all " 'confidential *employees*' (not limited to secretaries and, of course, not limited by the labor relations[] nexus) are unprotected under the Act" (Pet. App. 10a; emphasis in original). Finally, he stated (*id.* at 12a-13a; emphasis in original, footnotes omitted):

> To paint with a broad brush about the purported exclusion of "confidential employees" (other than those having the well-accepted "labor nexus") from the protection of the Act may be to strike a major blow at white collar unionism. Many, *if not most*, white collar workers are involved in something which may be argued to be "confidential" in some general sense. There are matters of credit, of costs, of designs, of customer lists, of prices, of medical records—the list is endless. I do not perceive at all that the dicta of *Bell Aerospace* point down this road.

B. Malleable

1. On December 18, 1978, Local 39 of the Office and Professional Employees International Union, AFL-CIO-CLC, filed a representation petition seeking certification as the collective bargaining agent for a unit of office clerical, technical, and professional personnel employed by Malleable Iron Range Company, a manufacturer of castings, appliances, and jobbing work in Beaver Dam, Wisconsin (Pet. App. 56a-57a, 66a). At the subsequent rep-

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[10] Judge Cudahy observed (Pet. App. 10a; emphasis in original):

> [Hendricks'] strongest (or at least most fully developed) argument to the contrary seems to be that Weatherman was responsible for processing employees' medical and disability insurance claims—admittedly confidential. But these were the confidences of *employees* she had to keep. It is simply ludicrous that one should be classified as part of "management" and lose the protections conferred on "labor" because one is entrusted with the confidences of one's fellow workers.

resentation hearing, Malleable claimed, among other things,[11] that 18 of the approximately 64 unit employees were excluded from the Act by reason of their access to allegedly confidential—albeit not labor-related—business information. The allegedly excluded employees were four engineers and three draftsmen in Malleable's technical services section; three assistants to the manager of the distribution-traffic-product service department; an "inside" salesman; the assistants to the managers of the advertising, cost, computer services, and credit departments; a computer operator; an assistant bookkeeper; and the industrial sales manger's secretary.

The evidence at the representation hearing showed that technical services engineers Kaiser, Heidemann, and Nagarkar test the company's appliances against industry code specifications (such as those promulgated by Underwriter's Laboratories) and make design modifications and component purchases necessary to ensure compliance (Pet. App. 80a-81a; Tr. 318-322, 329-331, 460). Engineer Murphy, as a production process coordinator, writes up the company's production methods for computer programming (Pet. App. 80a-81a; Tr. 311, 322-323). Draftsmen Herbst, Kostolni, and Lehmann design product blueprints (Pet. App. 80a; Tr. 310, 314-315, 318). In the course of their duties, these engineers and draftsmen have access to product specifications and test results (sometimes relating to patentable products) which are not available to the public or to employees in other departments (A. 35-36, 52). The engineers also gain knowledge of the costs of manufacturing particular products (A. 52-53).

Kuzniewicz, Schmitt, and Holloway are assistants to the manager of the distribution-traffic-product service department, a division of the consumer products marketing section. Holloway, who earns $3.50 an hour, is es-

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[11] See page 40, note 47, *infra*.

sentially a shipping clerk and performs such tasks as routing shipments, preparing bills of lading, tracing lost deliveries, and handling damage claim reports (Pet. App. 82a; A.54; Tr. 503-504, 733-735). Schmitt, who earns an annual salary of $10,500, handles all paperwork relating to shipments to and from Malleable's warehouses, and she is responsible for notifying her superiors when stock is low at a particular location (Pet. App. 82a; Tr. 497-502, 719, 721-722, 725). Kuzniewicz, who earns $6,400 a year, handles correspondence and telephone calls concerning difficulties with the company's products, and she is responsible for issuing credits on defective merchandise (Pet. App. 82a; A. 55; Tr. 485, 508, 798-800, 804). She is thus privy to credit data (which Malleable would keep confidential) that might bear upon product liability matters or reveal to competitors strategic "weakness[es]" in the company's products (A. 54-56). Kuzniewicz and Schmitt also have access to Malleable's dealership lists, which it considers an "invaluable price-list tool for anyone that wants to compete with us" (A. 56). Finally, all three assistants have access to daily sales volume figures, which company officials consider confidential as to competitors "because any time a competitor can learn how you're doing dollarwise, it would be a great help to him in damaging our reputation" (A. 54).

Pfingsten, the "inside" salesman, solicits distributors by telephone in distant areas. Through his work, Pfingsten gains access both to allegedly confidential data concerning sales volume in various areas and to lists of out-of-state distributors (Pet. App. 84a; A. 57-58). Christopherson, the assistant to the advertising department manager, writes advertising copy and helps coordinate advertising efforts with other departments and with the media. In the course of his duties, which include routing customer inquiries to appropriately located dealers, he also has access to distributorship lists. Pet. App. 83; A. 38, 58-59; Tr. 55, 61-62, 527-529.

Soldner is the assistant to the manager of the cost department, which collects overhead data from Malle-

able's various departments. By obtaining material and labor costs from previously-prepared cost sheets and adding a pre-determined markup specified by the company controller, Soldner "costs out" range, factory sales, and foundry parts. He therefore has access to profit percentages and "cost tests" that are not available to the public or to employees in other departments. Pet. App. 88a-89a; A. 49-51; Tr. 834-835.

Wendlandt assists the manager of the computer services department and prepares programs relating to Malleable's financial matters, such as receivable and payable accounts, payroll checks, and sales-cost analyses. Anderson is a computer operator who works with Wendlandt in processing this data. Certain of the financial reports (and underlying raw data) which these employees handle reveal assertedly confidential cost and profit-margin information. Pet. App. 88a, 89a; A. 42, 47-48, 67-70; Tr. 135-136.

Krause, the assistant to the credit department manager, checks in the cash each day and records it on the company's ledgers. He also determines whether dealers are delinquent by looking at monthly statements, and he updates dealer correspondence. Krause also checks customer credit ratings and assists customers in arranging security interests on credit transactions by ensuring that the required papers are properly prepared and the correct fees are paid. In the course of this work, Krause has access to information concerning both the volume of Malleable's accounts receivable and the status of particular credit accounts, information that management would "not want to leave the company." Pet. App. 90a; A. 59-61, 73-74; Tr. 588-589, 850-851.

Assistant bookkeeper Schwantes prepares cash-intake summaries and accounts payable paperwork for submission to data processing (Pet. App. 90a; A. 59, 74). Finally, Oelke, who is the industrial sales manager's secretary, handles calls from customers concerning pricing and delivery. She also transfers data from purchase orders to Malleable's internal procurement forms, ar-

ranges times for delivery of certain company products, and ensures that various materials are picked up from suppliers. In the course of her duties, she has access to information concerning anticipated price increases, and she routinely handles such cost data as price quotations from the company's suppliers. Pet. App. 85a; A. 63-67; Tr. 620-621.

Applying the Board's "labor nexus" test, the Regional Director found that these employees were properly included in the bargaining unit because none of them worked "in a confidential capacity for a person involved in the formulation, determination and effectuation of the Employer's labor relations policies" (Pet. App. 82a, 84a, 85a, 89a, 90a). An election was held, in which Local 39 prevailed by a vote of 40 to 15, and the Board certified Local 39 as the bargaining agent (Pet. App. 65a, 68a). Malleable contested the validity of the certification, however, and refused to bargain with the union, which subsequently filed charges with the Board. The Board found that Malleable's refusal to bargain violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), and a bargaining order was issued (Pet. App. 68a-72a).

2. By divided vote, the court of appeals denied enforcement, stating that (Pet. App. 58a):

> [Malleable] has contended that at least 18 of its employees should be excluded from the unit because they have access to confidential information and are therefore confidential employees. The Board conceded that in determining the employees included in the unit it applied "the Board's traditional 'labor nexus' test" and not the test or standard established in the *Hendricks* case.

Accordingly, the case was remanded to the Board for further consideration in light of the decision in *Hendricks* (Pet. App. 59a).[12]

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[12] Judge Cudahy dissented from the remand order with respect to 17 of the 18 employees whose coverage was at issue (Pet. App. 60a). He conceded, however, that a remand "might be needed"

SUMMARY OF ARGUMENT

1. a. The Board's present policy with respect to "confidential employees" is consistent with more than 40 years of administrative and judicial practice, and with the legislative history of the Taft-Hartley amendments. Although the original Wagner Act did not in terms require exclusionary treatment of confidential employees, the Board routinely excluded from rank-and-file bargaining units employees (such as confidential secretaries to labor relations management personnel) with access to strategic labor relations information that could prejudice the employer's position at the bargaining table. The scope of this exclusionary rule was limited, however, to persons whose "labor nexus" was substantial. The rule did not apply, for instance, to secretaries to management personnel who had only tangential responsibility for labor relations matters, and it did not apply at all to persons with access to confidential non-labor-related business information. With respect to these individuals, the Board repeatedly held—and the courts of appeals agreed—that there was no inherent conflict between self-organization under the Act and the faithful performance of confidential duties. Rather, the appropriate remedy for individual breaches of an employer's trust was perceived to rest with the employer's prerogative to discipline or discharge the offending employee.

b. When the Eightieth Congress was considering the Taft-Hartley amendments in 1947, the House passed legislation that would have excluded from the Act as "supervisors" all employees with access to an employer's confidential business information, labor related and otherwise. Members of Congress, labor representatives, and Board Chairman Herzog all warned that such a broad exclusion would deny statutory protection to "large

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under the court's first decision in *Hendricks* with respect to the secretary to the industrial sales manager, the "[o]nly one of the challenged employees [who] is a secretary" (*ibid.*).

classes of white-collar workers" who were neither managerial nor truly supervisory. The Conference Committee rejected the House bill in favor of the Senate version, which did not exclude "confidential employees" of any description, and which expressly provided statutory coverage for professional employees, who often had routine access to highly confidential business information. The conferees specifically noted their approval of the "prevailing Board practice" with respect to confidential employees, and stated their intention not to alter that practice "in any respect."

c. After the enactment of the Taft-Hartley amendments, and to this day, the Board continued to accord to all "confidential employees" the protection of the Act, and to exclude from rank-and-file bargaining units only those with a substantial "labor nexus." This narrow exclusionary practice has been repeatedly sustained by the courts of appeals, and was left undisturbed by Congress in 1959, when it again rejected proposals to alter the practice while adopting other amendments to the Act.

d. This Court's decision in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), raises no question concerning the Board's practice with respect to "confidential employees." The policies of the Act that led the Court to exclude all managerial employees from statutory coverage do not dictate a similar result with respect to "confidential employees," and the Board's present exclusionary rule with respect to confidentials—unlike its attempt in 1970 to effect an innovative narrowing of the managerial exclusion—is supported by several decades of consistent administrative practice. Moreover, the suggestion in *Bell Aerospace Co.* that the Eightieth Congress may have intended a categorical exclusion of "confidential employees"—comparable to that contained in the unenacted House bill—is contradicted by Congress' express inclusion of professional employees, many of whom necessarily have routine access to confidential information. Finally,

adoption of the broad exclusionary standard for "confidential employees" enunciated by the court below would strike a major blow at statutory protection both for the growing white-collar workforce and for many skilled blue-collar workers, and would constitute a departure from the statutory language and policy and from widespread practice that should not be countenanced in the absence of a clear expression of congressional intent.

2. The Board properly found that the employees in these cases were not "confidential employees" for purposes of the Act. The employees whose status is at issue in *Malleable* are not alleged to have any "labor nexus," and the secretary involved in *Hendricks* did not serve in any confidential capacity, much less with respect to labor relations matters. Moreover, even if the secretary in *Hendricks* were determined to be a confidential secretary and excludable from a rank-and-file bargaining unit on that basis, neither the public policy of the Act nor its legislative history supports the conclusion that she was not protected by the Act with respect to her employer's unfair labor practices.

3. Hendricks' additional assertion that the secretary was a personnel department employee was properly rejected both by the Board and by the court of appeals. The record shows that she had nothing to do with employee grievances, discipline, or reward. The only confidential personnel-type materials that she handled were employees' medical and disability insurance claim forms, and these reflected the confidences of her fellow employees, not those of the employer.

ARGUMENT

I. ALL NON-MANAGERIAL CONFIDENTIAL EMPLOYEES ARE FULLY PROTECTED BY THE NATIONAL LABOR RELATIONS ACT, BUT THOSE WHO ASSIST AND ACT IN A CONFIDENTIAL CAPACITY TO OFFICIALS WHO FORMULATE, EFFECTUATE, AND DETERMINE LABOR RELATIONS POLICIES, OR REGULARY HAVE ACCESS TO INFORMATION RELATING TO COLLECTIVE BARGAINING STRATEGY, ARE PROPERLY EXCLUDED FROM BARGAINING UNITS COMPRISED OF OTHER EMPLOYEES

For at least 40 years, the Board has ruled that all non-managerial confidential employees are fully protected by the National Labor Relations Act, but that those who assist and act in a confidential capacity to officials who formulate, effectuate, and determine labor relations policies, or regularly have access to confidential information concerning labor relations, should be excluded from bargaining units of other employees. Neither the Board nor any other court of appeals has ever recognized the broad exclusion created by the decision below. In this section, we trace the development of the Board's approach under the Wagner Act of 1935, ch. 372, 49 Stat. 449, and show that Congress, despite repeated amendments to the Act, has not seen fit to amend the law in this respect. We then show that the Board's approach is not inconsistent with *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), in which the Court considered the very different question whether managerial employees should be excluded from the protection of the Act without regard to whether their immediate responsibilities encompass labor relations matters.

A. "Confidential Employees" Were Not Excluded From Protection Under the Wagner Act

The Wagner Act did not in terms exclude "confidential employees" from the definition of "employees" covered by the Act, nor did it provide that "confidential em-

ployees" should be treated differently from other employees. See 49 Stat. 449, 450.[13] Shortly after the Wagner Act became law, however, the Board determined as a matter of statutory policy that employees with access to confidential labor-related information should be excluded from bargaining units comprised of employees who did not have access to such information.[14] See *Western Union Telegraph Co.*, 38 N.L.R.B. 492, 499-500 (1942) (authorization clerk with custody of confidential employment relations materials); *Creamery Package Manufacturing Co.*, 34 N.L.R.B. 108, 110 (1941) (stenographer who made confidential reports and took dictation concerning labor problems); *Bethlehem Steel Co.*, 61 N.L.R.B. 854, 856 (1945) (clerk who had access to correspondence dealing with labor relations and grievances). In *Hoover Co.*, 55 N.L.R.B. 1321, 1323 (1944) (footnote omitted), the Board explained the justification for this policy:

> [I]n negotiating and in the settlement of grievances, the interests of a union and the management are ordinarily adverse. Consequently, we have adhered to the opinion that the management should not be required to handle labor relations matters through employees who are represented by the union with which the [c]ompany is required to deal and

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[13] Similarly, the current statutory definition of "employee" contains no reference to "confidential employees." See Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3).

[14] However, the Board has treated such employees as otherwise fully protected under the Act. *See, e.g., Southern Colorado Power Co.*, 13 N.L.R.B. 699, 710 (1939), enforced, 111 F.2d 539 (10th Cir. 1940); *Coopersville Cooperative Elevator Co.*, 77 N.L.R.B. 1083, 1084-1085 & n.6 (1948); *American Book-Stratford Press, Inc.*, 80 N.L.R.B. 914, 915 (1948); *Southern Greyhound Lines, Div. of Greyhound Lines, Inc.*, 169 N.L.R.B. 627 & n.2 (1968), enforced, 426 F.2d 1299, 1301 (5th Cir. 1970); *Service Technology Corp.*, 196 N.L.R.B. 1036, 1043 (1972), enforced, mem., 480 F.2d 923 (5th Cir. 1973) (table), cert. denied, 415 U.S. 948 (1974); *Peavey Co.*, 249 N.L.R.B. 853 n.3 (1980), enforced in relevant part, Nos. 80-2092 & 80-2128 (7th Cir. May 6, 1981), slip op. 4-5. But see *NLRB v. Wheeling Electric Co.*, 444 F.2d 783 (4th Cir. 1971).

> who in the normal performance of their duties may obtain advance information of the [c]ompany's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters.[15]

Accord, *Brooklyn Daily Eagle*, 13 N.L.R.B. 974, 986 (1939).

Thus, the Board routinely excluded from bargaining units confidential secretaries and clerks to managerial employees who had significant labor relations responsibilities.[16] For the same reason, the Board also generally excluded non-supervisory employees in labor relations, employment, and personnel departments, as well as time-study personnel.[17] However, the Board endeavored to limit the scope of its implied exclusion from the broad statutory coverage to those circumstances in which the *Hoover Co.* rationale truly applied. Thus, the Board

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[15] In *Hoover Co.*, the Board found inappropriate even a separate unit of employees with access to confidential labor-related information where the union seeking to represent them also represented the employer's production and maintenance complement. Accord, *Electric Boat Co.*, 57 N.L.R.B. 1348, 1349 (1944).

[16] See, *e.g.*, *Willys Overland Motors, Inc.*, 9 N.L.R.B. 924, 931 (1938) (private secretary to personnel manager); *Brooklyn Daily Eagle, supra*, 13 N.L.R.B. at 986 & n.7 (secretaries to managing editor and editor who had "ultimate power of management" in union dealings); *Babcock & Wilcox Co.*, 52 N.L.R.B. 900, 903 (1943) (executives' secretaries whose duties encompassed labor relations matters); *United States Automatic Corp.*, 58 N.L.R.B. 662, 664 (1944) (secretary to director of industrial relations); *New York Telephone Co.*, 53 N.L.R.B. 307, 310 (1943) (clerks to office managers with substantial labor-related duties); *Youngstown Sheet & Tube Co.*, 56 N.L.R.B. 559, 562 (1944) (clerks to general foreman).

[17] See, *e.g.*, *Consolidated Vultee Aircraft Corp.*, 54 N.L.R.B. 103, 105-106 (1943) (labor relations department employees); *Youngstown Sheet & Tube Co., supra*, 56 N.L.R.B. at 562 (employment department employees); *Montgomery Ward & Co.*, 36 N.L.R.B. 69, 72 (1941) (personnel department employees); *Yale & Towne Manufacturing Co.*, 60 N.L.R.B. 626, 628-629 (1945) (time-study personnel).

declined to exclude secretaries of managerial personnel who had only an insubstantial "labor nexus,"[18] secretaries with restricted access to confidential labor relations information possessed by their principals,[19] and individuals who possessed only non-strategic, albeit otherwise confidential, information pertaining to labor relations matters.[20]

The narrow scope of this exclusionary rule was further underscored by the Board's consistent refusal to exclude from bargaining units employees with access to non-labor-related confidential business information, on the ground that "the possession of important information is of itself insufficient to justify exclusion from the right to collective bargaining." *Creamery Package Manufacturing Co., supra*, 34 N.L.R.B. at 111. With respect to such individuals, the Board "s[aw] no necessity for any conflict" between "self-organization" and "the faithful performance of duty," and observed that "the remedy for * * * willful disregard or neglect of duty on the part of these employees lies implicitly in the power of the [employer] to discipline or discharge them." *Armour & Co.*, 49 N.L.R.B. 688, 690-691 (1943) (permitting union representing rank and file to represent plant clerks who

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[18] See, *e.g.*, *Brooklyn Daily Eagle, supra*, 13 N.L.R.B. at 987 & n.9 (secretaries to advertising, classified advertising, and circulation managers); *Coolerator Co.*, 53 N.L.R.B. 461, 463 (1943) (secretaries to cost accountant, assistant purchasing agent, credit and traffic manager, sales manager, purchasing agent, factory accountant, and safety director).

[19] See, *e.g.*, *Illinois Consolidated Telephone Co.*, 61 N.L.R.B. 447, 454 (1945) (general auditor's secretary, who did not have access to his confidential labor relations reports).

[20] See, *e.g.*, *Consolidated Vultee Aircraft Corp., supra*, 54 N.L.R.B. at 112-113 (clerks who handled confidential employment and personnel records); *Aluminum Co.*, 61 N.L.R.B. 1066, 1072 (1945) (senior account clerk with access to labor relations data of "principally historical importance").

collected, checked, and tabulated confidential production data).[21]

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[21] The Board thus refused to exclude from bargaining units various employees who had access to non-labor-related confidential information. See, *e.g.*, *Willys Overland Motors, Inc., supra*, 9 N.L.R.B. at 932-933 (engineers and other research and development employees performing "confidential" work); *Bull Dog Electric Products Co.*, 22 N.L.R.B. 1043, 1046 (1940) (draftsmen and engineers with access to "confidential matters"); *Creamery Package Manufacturing Co., supra*, 34 N.L.R.B. at 110-111 (blueprint machine operator with access to confidential documents); *Warner Bros. Pictures, Inc.*, 35 N.L.R.B. 739, 743-744 (1941) (legal, trust, and tax department employees); *Poultrymen's Service Corp.*, 41 N.L.R.B. 444, 447-448 (1942), enforced, 138 F.2d 204 (3d Cir. 1943) (office employees with access to "important" business information); *Bendix Products Div.*, 43 N.L.R.B. 912, 915-916 (1942) (laboratory employees with research information employer kept from competitors and customers); *Fairmont Creamery Co.*, 44 N.L.R.B. 941, 944-945 (1942) (office employees with access to price, accounts receivable, credit, and other "important" financial information); *Buffalo Arms Corp.*, 46 N.L.R.B. 1176, 1178 (1943) (shipping room employees with access to "highly confidential" information respecting the destination and quantity of employer's military products); *Bethlehem Steel Corp.*, 52 N.L.R.B. 1217, 1219-1220 (1943) (order department employees with access to "confidential" price and product-specification information); *Colonial Broach Co.*, 53 N.L.R.B. 846, 847-848 (1943) (employees with access to "confidential" financial information); *General Motors Corp., Chevrolet Motor Div.*, 53 N.L.R.B. 1096, 1102 (1943) (clerk trainees with access to machinery production schedules, cost records, and trade secrets); *Consolidated Vultee Aircraft Corp., supra*, 54 N.L.R.B. at 112-113 (clerks who handled confidential production schedules); *California Spray-Chemical Corp.*, 54 N.L.R.B. 1366, 1369 (1944) (research chemists); *Hudson Motor Car Co.*, 55 N.L.R.B. 509, 511 (1944) (comptometer operators, general audit employees, and buyers' secretaries); *Licoreria Roses, Inc.*, 55 N.L.R.B. 1324, 1327 (1944) (rum-blending assistants with knowledge of employer's trade secrets); *Bell Aircraft Corp.*, 56 N.L.R.B. 1356, 1359 (1944) (laboratory employees performing "secret" work on war products); *General Motors Corp., Chevrolet Gear & Axle Div.*, 56 N.L.R.B. 1547, 1549-1550 (1944) (office employees with access to "confidential management information and secret data with respect to the fulfillment of war contracts"); *B.F. Hirsch, Inc.*, 57 N.L.R.B. 59, 65-66 (1944) (shipping, receiving, and stock-

The *Creamery Package* doctrine was upheld by the only two courts of appeals that had occasion to review it under the Wagner Act. In *NLRB* v. *Armour & Co.*, 154 F.2d 570 (10th Cir. 1945), enforcing 54 N.L.R.B. 1005 (1944), the Tenth Circuit explicitly rejected the contention that employees who had access to "confidential" business information were for that reason disqualified from collective bargaining. Adopting the Board's rationale, the court concluded that (154 F.2d at 573-574):

> [E]xclusion from the benefits of the Act is not the price of honest and faithful service. It is true that the knowledge which the [employees in question] obtain is of a highly confidential nature and that its disclosure to competitors * * * might result in injury to [their employer]. But, we do not think those

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room employees with access to confidential blueprints and price data); *John Deere Spreader Works of Deere & Co.*, 57 N.L.R.B. 411, 413 (1944) (experimental field employees with access to "secret" information relating to product test results); *United States Automatic Corp., supra*, 58 N.L.R.B. at 664 (senior and junior secretaries, accounting clerks, general clerks, and payroll clerks, with access to confidential business information); *Murray Ohio Manufacturing Co.*, 61 N.L.R.B. 47, 57 (1945) (design lay-out engineers and detail draftsman who possess "information important to the Company from a business point of view"); *American Smelting & Refining Co.*, 61 N.L.R.B. 506, 508 (1945) (bookkeeper with access to all financial records of employer); *Aluminum Co., supra*, 61 N.L.R.B. at 1072-1073 (clerks with access to confidential profit, manufacturing cost, and other fiscal information); *Smith Wood Products, Inc.*, 62 N.L.R.B. 920, 923 (1945) (scalers who "gain information not known to other employees" concerning employer's output); *Aircooled Motor Corp.*, 63 N.L.R.B. 1043, 1046 (1944) (experimental assemblers, experimental machinists, and endurance testers); *Wisconsin Telephone Co.*, 65 N.L.R.B. 368, 377 (1945) (traffic engineering assistant with knowledge "of future plans of the company"); *Barrett Div., Allied Chemical & Dye Corp.*, 65 N.L.R.B. 903, 908 (1946) (construction record, accounts payable, distribution code, power department, and receiving clerks); *Sears, Roebuck & Co.*, 66 N.L.R.B. 285, 287 (1946) (clerical employees with access to "important business information").

> facts take the [employees] outside the [protection of the Act.] [Their employer] may require, as a condition of employment, that [the employees] treat such information as confidential.

Likewise, the Third Circuit declared that the Board's limited exclusionary policy was "sound." *NLRB* v. *Poultrymen's Service Corp.*, 138 F.2d 204, 210-211 (1943), enforcing 41 N.L.R.B. 444 (1942).[22]

In 1946, the Board restated the "labor nexus" test in somewhat narrower terms. In *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946), the Board concluded that the exclusion of all employees with *mere access* to confidential labor relations matters was "too inclusive and needlessly precludes many employees from bargaining collectively together with other workers having common interests." Finding appropriate a bargaining unit composed of time-study employees,[23] the Board limited its exclusionary rule to "only those employees who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations" (*ibid.*).[24] Accord, *Electric Controller & Manufacturing*

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[22] This Court noted (but had no occasion to pass on the validity of) the Board's *Creamery Package* decision in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 775 (1947).

[23] Because of their specialized technical training and particular conditions of employment, and not because of their confidential status, the Board determined (66 N.L.R.B. at 1322-1323) that the time-study personnel should not be included in the bargaining unit for office clerical employees.

[24] In finding that time-study personnel do not meet this test, the Board further stated (66 N.L.R.B. at 1322; footnote omitted): "The common denominator of all time-study personnel is their performance of fact-finding duties through means of time and motion studies which are utilized by management in determining techniques of production and rates of pay. The performance of these functions alone is not sufficient to warrant their exclusion. They cannot be regarded as formulating, determining, and effectu-

Co., 69 N.L.R.B. 1242, 1246 (1946) (declining to exclude secretary to department head who did not formulate or determine labor relations policies).

B. The 1947 Taft-Hartley Amendments Did Not Affect the Coverage Of Non-Managerial "Confidential Employees"

In *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947), this Court upheld the Board's certification of a bargaining unit comprised of plant foremen.[25] Four Justices dissented on the ground that the majority opinion compromised the essential distinction between labor and management: "For if foremen are 'employees' within the meaning of the National Labor Relations Act, so are vice-presidents, managers, assistant managers, superintendents, assistant superintendents—indeed, all who are on the payroll of the company, including the president; all who are commonly referred to as the management, with the exception of the directors" (*id.* at 494). It was largely in response to this decision that Congress, in 1947, considered numerous proposals for the express exclusion of supervisors from the protection of the Act.[26] On the one hand, various industry representatives argued for a broad exclusion that would have applied not only to foremen, but also to professional employees as well as to various office and clerical employees "in whom the employer must have a great amount of confidence and trust * * *" (*Senate Hearings* at 499 (statement of

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ating management policies, for they merely supply information which may be used by the employer in establishing policy regarding labor relations. Nor can they be considered as 'confidential,' inasmuch as they are primarily concerned with the gathering of technical data, and do not assist and act in a confidential capacity to a managerial employee in the field of labor relations."

[25] *Packard Motor Car Co.*, 61 N.L.R.B. 4, 64 N.L.R.B. 1212 (1945).

[26] See, *e.g.*, H.R. 8 § 2(3), (13), H.R. 725 § 101(b), (c), S. 55 § 202, S. 360 § 2(c), 80th Cong., 1st Sess. (1947).

John R. Van Arnum)).[27] On the other hand, both the Board and representatives of labor warned that such a sweeping exclusion would leave unprotected "large classes of white-collar workers whose duties are in no sense supervisory" (*id.* at 1166 (statement of Lee Pressman)).[28] In the end, Congress rejected the broad exclusion that industry sought.

1. *The House Bill.* Taking the broad approach advocated by industry, the House passed a bill that would have excluded from the Act a wide class of supervisory employees, as well as time-study personnel, plant guards, persons working in labor relations and personnel departments, and confidential employees. H.R. 3020, 80th Cong., 1st Sess. § 2(12) (1947). Moreover, Section 2(12)(C) of the bill defined "confidential employee" as "any individual * * * who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer."

The committee report on this bill predicted that the proposed exclusion would not effect a major change in coverage because "[m]ost of the people who would qualify

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[27] See *Senate Hearings* at 169 (statement of Theodore R. Iserman), 246 (statement of James D. Francis), 527 (statement of W. Homer Hartz), 617-618, 633 (statement of Almon E. Roth), 694-696 (statement of Charles R. Kuzell), 911 (statement of Hugh H.C. Weed), 1741, 1743 (statement of George Beardmore); *House Hearings* at 353-354, 373 (statement of Mr. Weed), 435 (statement of George S. Eaton), 537-538, 542 (statement of Grant L. Cook), 573 (statement of Mr. Roth), 664 (statement of Rolla D. Campbell), 1225 (statement of Howard I. Young), 2178 (statement of John S. Richards), 2720 (statement of Mr. Iserman).

[28] See *Senate Hearings* at 1173-1175 (statement of Edward G. Wilms), 1546 (statement of G.L. Patterson), 1862, 1907 (statement of Board Chairman Paul M. Herzog); *House Hearings* at 1190 (statement of Mr. Wilms), 2246-2247 (statement of Joseph A. Beirne), 3092 (statement of Mr. Herzog); see also *Senate Hearings* at 2056 (statement of former Board Member Gerard D. Reilly).

[under the bill] as 'confidential' employees are *executives* and are excluded from the [A]ct in any event." H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947) (emphasis added). However, recognizing that the then-current Board practice was limited to "exclud[ing] from bargaining units confidential clerks and secretaries to such people as these[,]"[29] the House committee went on to set forth the policy considerations that supported a broader exclusionary rule (*ibid.*):

> [P]rotecting confidential financial information from competitors and speculators, protecting secret processes and experiments from competitors, and protecting other vital secrets ought not to rest in the administrative discretion of the Board or on the responsibility of whatever union happens to represent the employees. The bill therefore excludes from the definition of employees persons holding positions of trust and confidence whose duties give them secret information.

During the House debates on H.R. 3020, various members challenged the committee's assertion that the practical effect of the proposed exclusion would be limited, arguing that "[t]here has been no evidence submitted * * * to suggest the necessity to exclude [such] a large group of employees from the benefits of collective bargaining." 93 Cong. Rec. 3662 (1947), I *Legis. Hist.* at 847 (remarks of Rep. Jackson). For example, Representative Jackson contended that the bill would "wipe[] out of existence" the International Federation of Technical Engineers, Architects, and Draftsmen's Unions, which had "a record of splendid relations with their employers and their members" (*ibid.*). He continued (93 Cong. Rec. 3662-3663 (1947), I *Legis. Hist.* at 847):

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[29] As we have shown (see page 19, note 16, *supra*), the Board routinely excluded from bargaining units confidential assistants to executives and other high-level managerial personnel who possessed the ultimate power of management in dealings with labor.

> This organization represents a high type of membership who do the architectural, engineering, and scientific work of our country. They use their brains in seeking out new materials and new methods of production. By the very nature of their work, they have confidential information which is neither available to the public nor to their employer's competitors. As the result of their research and investigation, they are reducing the man-hours required in production and are constantly improving the design of the product of their employer in order to gain advantage over their competitors. They are loyal employees and use the confidential knowledge which they have for the benefit of their employers and they should not be prohibited from joining a union for the improvement of their economic status.

Representative Klein—echoing a labor representative's view that such a capacious exclusion would "seriously jeopardize the future of every white-collar worker" (*House Hearings* at 1190 (statement of Edward G. Wilms))—argued (93 Cong. Rec. 3446 (1947), I *Legis. Hist.* at 652) that the House bill went "much too far," and would

> remove[] from the protection of the [A]ct thousands of white-collar employees, payroll clerks, inspectors, watchmen, lead men, timekeepers, and typists. * * * Such excluded workers will not only be powerless to bargain, they will also be without protection against discharge for union membership. If they desire to organize against the employer's will[,] their only weapon will be to resort to the strike, the very result which the Wagner Act was intended to avert.

2. *The Senate Bill.* On the other hand, the Senate passed a bill that rejected the House's broad definition of "supervisor" and contained no exclusion for time-study personnel, plant guards, individuals working in labor relations and personnel departments, or confidential employees of any description. S. 1126, 80th Cong., 1st Sess. § 2(11) (1947). Indeed, Section 2(12) of the Senate Bill expressly included "professional employees" within the

coverage of the Act, thereby encompassing many individuals who necessarily would have been excluded under the House definition of "confidential employees." [30]

3. *The Conference Committee.* In conference, the Senate's view prevailed. Professional employees were specifically accorded the protection of the Act. Moreover, the conferees accepted the Senate's narrower definition of "supervisor" and deleted all references to excluding persons working in labor relations and personnel departments, confidential employees, time-study personnel, and guards.[31] See H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 35-36 (1947). The Conference Report carefully detailed the understanding of the conferees with respect to each deletion (*ibid.*):

> The conference agreement, in the definition of "supervisor," limits such term to those individuals treated as supervisors under the Senate amendment. In the case of persons working in labor relations, personnel[,] and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the [A]ct. This

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[30] The Senate Report expressed the view that such persons as architects, engineers, lawyers, and scientists should not only be protected under the Act, but should also be permitted to form bargaining units separate from those of non-professional personnel. S. Rep. No. 105, 80th Cong., 1st Sess. 11, 19 (1947).

[31] Senator Taft, who sponsored the Senate Bill, explained the conference agreement as follows (93 Cong. Rec. 6445 (1947), II *Legis. Hist.* at 1544 (emphasis added)):

> We accepted a provision regarding plant guards. We have exempted foremen in the Senate bill, but we had not exempted plant guards. The House bill exempted plant guards, and also time-study employees and personnel forces. *We did not accept any of those provisions,* except that as to plant guards we provided that they could have the protection of the Wagner Act only if they had a union separate and apart from the union of the general employees.

> is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. The conference agreement does not treat time-study personnel or guards as supervisors, as did the House bill. Since, however, time-study employees may qualify as professional personnel, the special provisions of the Senate amendment * * * applicable with respect to professional employees will cover many in this category. In the case of guards, the conference does not permit the certification of a labor organization as the bargaining representative of guards if it admits to membership, or is affiliated with any organization that admits to membership, employees other than guards.

C. The Board's Practice With Respect To "Confidential Employees" Remained Unchanged After The 1947 Taft-Hartley Amendments

The Board continued after the enactment of the 1947 amendments to exclude from bargaining units of other employees only those confidential employees with a "labor nexus." In *Art Metal Construction Co.*, 75 N.L.R.B. 80, 83-84 (1947), for example, the Board excluded an employee who typed confidential labor relations reports, but refused to exclude a second employee, whose work concerned only non-labor-related confidential business information.[32] Likewise, in *B. F. Goodrich Co.*, 115 N.L.R.B. 722 (1956), the Board reaffirmed the "labor nexus" test as refined in *Ford Motor Co.* (see pages 23-24, *supra*), declaring (115 N.L.R.B. at 724; emphasis in original) that it would continue to exclude from bargaining units

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[32] See also *Chrysler Corp.*, 76 N.L.R.B. 50, 53 (1948) (declining to exclude office employees with access to confidential business and financial records); *Guy F. Atkinson Co.*, 83 N.L.R.B. 1004, 1005 (1949) (declining to exclude professional cost estimators with access to confidential business information); *Sargent & Co.*, 95 N.L.R.B. 1515, 1518 (1951) (declining to exclude research mechanics with access to trade secrets).

"only those employees who assist and act in a confidential capacity to persons who formulate, determine, *and* effectuate management policies in the field of labor relations." [33] In *B. F. Goodrich Co.*, the Board therefore excluded from the unit the secretaries to the personnel manager and office manager "because of the role in past and future bargaining negotiations assigned to the officials for whom they work," but included the secretaries to the plant engineer and the managers of the industrial engineering, purchasing, production, and technical divisions (*id.* at 725). Moreover, the Board continued, as it had under the Wagner Act (see pages 17-24, *supra*), to exclude individuals who, although not acting in a confidential capacity to a particular labor relations management official nonetheless regularly had access in the course of their work to "strategic" confidential labor relations information.[34]

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[33] In a few cases after *Ford Motor Co.*, the Board had returned to its original practice of designating as "confidential employees" those who merely had *access* to confidential labor relations information. See *Bond Stores, Inc.*, 99 N.L.R.B. 1029, 1031 n.4 (1952); *Minneapolis-Honeywell Regulator Co.*, 107 N.L.R.B. 1191, 1192 (1954).

[34] See, *e.g.*, *American Lithofold Corp.*, 107 N.L.R.B. 1061, 1065 (1954) (excluding general bookkeeper and chief payroll officer with access to information respecting anticipated changes in employer's pay scale that would result from negotiations with the union); *Potomac Electric Power Co.*, 111 N.L.R.B. 553, 562 (1955) (excluding clerk-stenographers and clerk-typists "who in the course of their duties regularly have access to information concerning anticipated changes which may result from collective-bargaining negotiations"); *Triangle Publications, Inc.*, 118 N.L.R.B. 595, 596 & nn.3-4 (1957) (excluding payroll clerks with access to data "showing the effect of wage adjustments contemplated in labor contract negotiations"); *Pullman Standard Div. of Pullman, Inc.*, 214 N.L.R.B. 762-763 (1974) (excluding labor cost estimators who regularly utilized employer documents disclosing managerial estimates of the anticipated results of future labor contract negotiations). Compare *American Radiator & Standard Sanitary Corp.*, 119 N.L.R.B. 1715, 1720-1721 (1958) (including personnel clerk who compiled statistical data, but had no knowledge of labor policy proposals which could result therefrom).

This was the Board's policy in 1959,[35] when Congress, in considering the Landrum-Griffin amendments, was again urged to change it, and again declined to do so.[36] This remains the Board's policy today. See *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 N.L.R.B. No. 54 (Nov. 21, 1980).

The courts of appeals (except for the court below) have consistently approved the Board's narrow exclusionary policy. In *Union Oil of California, Inc.* v. *NLRB*, 607 F.2d 852, 853-854 (1979), for instance, the Ninth Circuit upheld the Board's determination that three computer operators, who were responsible for computer entry and extraction of confidential business information, were not "confidential employees" for purposes of the Act. In approving the Board's "labor nexus" test, the court noted (*id.* at 853) that the Board's narrow definition of "confidential employee" was reasonable "[b]ecause most employees have an arguably confidential relationship with management, and because an expansive application of the exclusionary rule would deprive many employees of the right to bargain collectively." Accord, *NLRB* v. *Los Angeles New Hospital*, 640 F.2d 1017, 1023 (9th Cir. 1981) (secretary's mere access to "raw, confidential" fiscal data

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[35] See, *e.g.*, *Dinkler-St. Charles Hotel, Inc.*, 124 N.L.R.B. 1302, 1304 & n.6 (1959) (declining to exclude office clericals who had access to confidential financial information).

[36] Theodore R. Iserman, representing the National Small Businessmen's Association, noted that the 1947 House Bill would have excluded from the coverage of the Act, *inter alia*, "confidential employees, such as cost estimators, development engineers, pricing specialists, and secretaries to officers and executives," and urged the Eightieth Congress to adopt that exclusion as a part of the Landrum-Griffin amendments. *Labor Management Reform Legislation: Hearings on H.R. 3540, H.R. 3302, H.R. 4473 and H.R. 4474 Before the Jt. Subcomm. of the House Comm. on Education and Labor*, 86th Cong., 1st Sess. 1473 (1959). The amendments which were enacted, however, contained no provision with respect to "confidential employees." See 73 Stat. 519.

and non-strategic labor-relations information did not render her a confidential employee); *Westinghouse Electric Corp.* v. *NLRB*, 398 F.2d 669, 670-672 (6th Cir. 1968) (declining to exclude secretaries whose principals had insufficiently substantial labor relations responsibilities).[37]

D. The Board's Continued Adherence To The "Labor Nexus" Test Is Not Inconsistent With This Court's Decision In *Bell Aerospace* And Comports With Widespread Collective Bargaining Practices As Well As Congressional Policy And Intent

Although the court below acknowledged (Pet. App. 30a) that the Board had "historically" applied the "labor nexus" test in determining the rights of "confidential employees" under the Act, the court concluded (*id.* at 28a-31a) that the legislative history of the Taft-Hartley amendments, read in light of this Court's decision in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), required the rejection of that test in favor of what is effectively the broad exclusionary rule proposed in the 1947 House bill. That conclusion is unwarranted.

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[37] See also *Service Technology Corp.*, 196 N.L.R.B. 1036, 1040-1041 (1972), enforced mem., 480 F.2d 923 (5th Cir. 1973), cert. denied, 415 U.S. 948 (1974) (declining to exclude project manager's secretary with "complete lack of contact" with labor-relations matters); *NLRB* v. *Hoerner-Waldorf Corp.*, 525 F.2d 805, 807-808 (8th Cir. 1975) (enforcing bargaining order for a unit including two employees found not to be "confidential employees" under the "labor nexus" standard); *California Inspection Rating Bureau*, 215 N.L.R.B. 780, 783 (1974), bargaining order enforced, 591 F.2d 56 (9th Cir. 1979) (declining to exclude accounting clerks with access to confidential personnel information but without access to strategic labor relations data). Compare *NLRB* v. *Allied Products Corp., Richard Brothers Div.*, 548 F.2d 644, 648-650 (6th Cir. 1977) (approving the "labor nexus" test, but rejecting the Board's application of test to the facts); *NLRB* v. *Quaker City Life Insurance Co.*, 315 F.2d 690, 692, 694 (4th Cir. 1963) (same).

In *Bell Aerospace Co.*, this Court held that all truly "managerial" employees[38] are excluded from the Act, thereby rejecting the Board's newly adopted view that only those "managerial" employees susceptible to conflicts of interest in labor relations matters should be excluded (416 U.S. at 274, 289).[39] First, the Court noted (*id.* at 275-277, 285-288) that the Board had consistently excluded all "managerial" employees from bargaining units composed of other employees until 1970. Second, the Court found that the Act's essential distinction between management and labor could not be maintained without the exclusion of all truly "managerial" employees (*id.* at 282, 284-285 n.13).[40] Finally, the Court noted that the legislative history of the 1947 amendments showed that Congress believed that certain categories of employees, including certain confidential employees, were so clearly beyond the protection of the Act that no specific exclusionary provision was deemed necessary. The Court found that " 'managerial employees' were paramount among this impliedly excluded group" (*id.* at 283-284).

Nothing in the Court's holding requires rejection of the Board's "labor nexus" test for determining the status under the Act of confidential non-managerial personnel. Whereas a "labor nexus" test was not used with respect to managerial employees until 1970, the Board has consistently applied such a test to non-managerial confidential employees since the early days of the Wagner Act. See pages 17-24, 29-32, *supra*. Moreover, as the court below conceded (Pet. App. 28a), the public policy considerations favoring categorical exclusion of true managerial personnel do not suggest any need for similar treatment

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[38] Managerial employees are employees who " 'formulate and effectuate management policies by expressing and making operative the decisions of their employer' " (416 U.S. at 288).

[39] See *North Arkansas Electric Cooperative, Inc.*, 185 N.L.R.B. 550 (1970), enforcement denied, 446 F.2d 602 (8th Cir. 1971).

[40] See *Packard Motor Car Co.* v. *NLRB*, *supra*, 330 U.S. at 494 (Douglas, J., dissenting).

of confidential employees. As this Court noted in *Bell Aerospace Co.*, "managerial" employees have "abandoned the 'collective security' of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such 'security' " (416 U.S. at 281 n.11, quoting H.R. Rep. No. 245, *supra*, 16-17). No such statement could realistically be made, however, with respect to the broad class of persons excluded from the Act by the Seventh Circuit's definition of "confidential employees." These persons are manifestly "workers" rather than "bosses," and they have not chosen to "abandon[] the collective security of the rank and file voluntarily." Indeed, these persons have become "confidential employees" only because their employers have chosen, for their own purposes, to have these persons handle (often in an essentially ministerial fashion) certain information that the employer would prefer not to have disseminated widely. In these circumstances, a fair balance between legitimate employer and employee interests is achieved, not by excluding all confidential employees from the Act, but by insulating the employer from the conflicts that could result from placing employees with confidential labor relations information in the same unit with other employees.

Nor is a different conclusion required by the Court's observation in *Bell Aerospace Co.* that (416 U.S. at 284 n.12):

> In 1946, in *Ford Motor Co.*, 66 N.LR.B. 1317, 1322, the Board had narrowed its definition of 'confidential employees' to embrace only those who exercised " 'managerial' functions in the field of labor relations." The discussion of "confidential employees" in both the House and Conference Committee Reports, however, unmistakably refers to that term as defined in the House bill, which was not limited just to those in "labor relations." Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.

This observation, which was not essential to the Court's holding in *Bell Aerospace Co.*, involves an important issue that was not fully explored by the parties in that case (since they had no need to do so). We respectfully submit that this footnote observation by the Court apparently reflects two misconceptions that are significant for present purposes (although inconsequential to the holding in *Bell Aerospace Co.*). First, the Court's observation seems to suggest that in *Ford Motor Co.* the Board announced the "labor nexus" test for the first time, as a significant departure from past practice. That is not the case, as we have previously shown (see pages 17-24, *supra*).[41] Second, the Court's restatement of the test announced in *Ford Motor Co.* combined two separate and distinct principles: that relating to "managerial" employees, and that relating to non-managerial "confidential" employees.[42] Although the combination of these principles was

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[41] Based upon the assumption that the "labor nexus" test was first announced in 1946 in *Ford Motor Co.*, the Court seems to suggest that the conferees therefore may not have been aware of that "recent" development when they gave their express approval to the "prevailing Board practice" the following year. By 1947, however, the Board had consistently applied the "labor nexus" test to confidential employees for nearly ten years, and the Board's practice had twice received explicit judicial approval during that period (see pages 17-24, *supra*). Moreover, the "labor nexus" test had repeatedly been brought to Congress' attention in the Board's annual reports. See, *e.g.*, 6 *NLRB Ann. Rep.* 34 & n.92 (1945); 8 *NLRB Ann. Rep.* 32 & nn.19-21, 56 (1946); see also 10 *NLRB Ann. Rep.* 70-71 & n.59 (1941); 11 *NLRB Ann. Rep.* 56 n.55 (1943). *Ford Motor Co.* simply narrowed the "labor nexus" test (see pages 23-24, *supra*). That modification has no significance here because the employees here would not have been "confidential employees" even under the earlier, broader test (see pages 39-41, *infra*).

[42] In *Ford Motor Co.*, *supra*, 66 N.L.R.B. at 1322 (footnote omitted), the Board carefully distinguished the two principles:

> We have customarily excluded from bargaining units of rank and file workers executive employees who are in a position to

immaterial to the analysis in *Bell Aerospace*, where the status of true "managerial" employees was at issue, the two principles must be kept separate here, where the status of only non-managerial employees is at issue. Moreover, as we have also shown (see pages 27-29, *supra*), the conferees clearly rejected not only the specific exclusion for "confidential employees" contained in the House bill, but also the general principle upon which it rested. Otherwise, Congress would not have followed the Senate version by specifically including various groups of professional employees who would by definition have routine access to various kinds of confidential information.[43] Finally, the conferees expressed their approval of the

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formulate, determine, and effectuate management policies. These employees we have considered and still deem to be "managerial," in that they express and make operative the decisions of management.

We have also excluded from units of rank and file employees persons who, in the regular course of their duties, have access to confidential data bearing directly upon the employees' labor relations, designating them as "confidential." However, upon reappraisal, we are of the opinion that this definition is too inclusive and needlessly precludes many employees from bargaining collectively together with other workers having common interests. Consequently, it is our intention to limit the term "confidential" so as to embrace only those employees who assist and act in a confidential capacity to persons who exercise "managerial" functions in the field of labor relations.

[43] It would make no sense to include within the coverage of the Act a research chemist having access to trade secrets, while excluding his "confidential" secretary or clerk. That result would not further the public policy of the Act, and it is one that should not be embraced without clear evidence that Congress so intended. Indeed, if it is assumed that some danger of unfair play may result when non-labor-related confidential information is placed in the hands of employees, it is more likely that harm could be done to the employer by professional employees who, by virtue of their training and expertise, are far more likely than clerical workers to understand the significance of the information they possess. Yet Congress deliberately chose not to exclude such persons from the protection of the Act.

"prevailing Board practice," and that practice—which had been consistently followed for nearly ten years prior to 1947—merely accorded a special status to confidential employees meeting the "labor nexus" test, excluding such employees only from participation in bargaining units composed of other employees.[44]

In sum, the Board's determination that non-managerial confidential employees are entitled to the full protection of the Act unless they assist and act in a confidential capacity to officials who formulate, effectuate, and determine labor relations policies, or have access to "strategic" labor relations information, is a longstanding and reasonable interpretation of the Act, which is entitled to substantial deference. See *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979). As the many cases cited in this brief illustrate, this interpretation has been the basis for widespread establishment and maintenance over many years of collective bargaining relationships that would be excluded from the Act's protection by the decision below. This long-observed implementation of the Act (a species of "law of the shop") has well served the statutory purpose of promoting peaceful resolution of labor-management disputes through collective bargaining and has not resulted in the compromising of employer-employee confidences.

Moreover, the reasonableness of the Board's limited implied exclusionary rule is well demonstrated by the

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[44] Contrary to the view expressed by the court below (Pet. App. 4a, 29a-30a), the exclusion of all employees having any type of confidential information is not compelled by the Court's observation in *Bell Aerospace Co.* (in concluding that managerial employees are excluded from the coverage of the Act) that "Congress could not have supposed that, while 'confidential secretaries' could not be organized, their bosses could be" (416 U.S. at 284, quoting 475 F.2d 491-492 (2d Cir. 1973)). That observation does not suggest that all "confidential employees" are excluded from the Act. The Court was merely answering the argument that, because Congress had mentioned confidential secretaries as persons intended to be excluded, and had not mentioned managerial employees, it could not be assumed that it intended to exclude managerial employees. See also 416 U.S. at 304-306 (White, J., dissenting).

consequences of the court of appeals' broader rule, which would exclude all employees with access to business information that the employer would keep confidential insofar as other employees, competitors, regulatory agencies, and the public are concerned (Pet. App. 8a). The rule formulated by the court of appeals would strike a major blow at white collar unionism, regardless of the care with which "business information" may be defined.[45] "Many, *if not most*, white collar workers are involved in something which may be argued to be 'confidential' in some general sense. There are matters of credit, of costs, of designs, of customer lists, of prices, of medical records —the list is endless" (Pet. App. 12a; Cudahy, J., dissenting; emphasis in original; footnote omitted). Even teachers, who are professional communicators, are ordinarily required to keep examination questions confidential prior to the administration of examinations. Similarly, journalists often protect the confidentiality of their sources, and they and news media production workers refrain from disclosing "scoops" before publication. Nor would the impact of this rule necessarily be limited to white-collar workers.[46] Many blue-collar employees

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[45] For example, if the term were confined to the widely-accepted definition of a "trade secret," bargaining rights would be denied to every employee with access to

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may [, for example,] be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

Kewanee Oil Co. v. *Bicron Corp.*, 416 U.S. 470, 474-475 (1974), quoting the *Restatement of Torts* §757, Comment b (1939).

[46] However, the Bureau of Labor Statistics reports that, by 1990, fully 50 percent of the nation's new jobs will be "white-collar"—including office clerical, professional, and technical positions. U.S. Bureau of Labor Statistics, Dep't of Labor, News, Doc. No. USDL 79-903 (Dec. 27, 1979).

must routinely have access to such matters as manufacturing processes and assembly procedures, which their employer intends to keep confidential with respect to customers and competitors. Indeed, as the Ninth Circuit observed in *Union Oil of California, Inc.* v. *NLRB*, *supra*, 607 F.2d at 853 (emphasis added), it is precisely because "*most* employees have an arguably confidential relationship with management" that the Board has historically "narrowly construed the definition of confidential employee." It is clear, moreover, that the ever-increasing complexity of modern industrial processes and commercial practices, together with the great strides that have been made in the area of data processing, have significantly increased the number of employees who, for the convenience of their employers, must have access to information that might properly be considered confidential. A rejection of the Board's narrow test would thus have a potentially staggering impact on the scope of protection accorded by the Act; "[i]f Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly." *NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 284-285 n.13.

II. THE BOARD PROPERLY DETERMINED THAT THE EMPLOYEES IN THESE CASES ARE NOT "CONFIDENTIAL EMPLOYEES" UNDER THE ACT

1. The 18 office employees whose status is at issue in *Malleable* had access, in the course of their duties, to business data—such as financial reports, cost and price data, and distributorship lists—that their employer would keep confidential as to the public, competitors, and other employees. Malleable has never claimed, however, that these employees assist and act in a confidential capacity to persons who exercise managerial functions in the field of labor relations, nor has it contended that any of them otherwise has access to confidential information that is directly related to labor relations maters. It is clear, therefore, that the Board properly declined to exclude

these persons from the bargaining unit as "confidential employees" with a "labor nexus." [47]

2. Similarly, the Board found in *Hendricks* (Pet. App. 43a-49a) that Weatherman had no "labor nexus" whatsoever, and the court of appeals unanimously agreed (*id.* at 27a). Dillon, Weatherman's principal, played a "most passive" role in labor relations matters (*id.* at 47a); he admittedly played no part in the formulation of Hendricks' labor policies or in the interpretation of its labor contracts, and he had "[v]ery little" (A. 23) to do with its negotiations with the union.[48] Moreover, Weatherman's duties were "deliberately restricted" (Pet. App. 45a) to preclude her from acting in a confidential capacity to Dillon with respect to the few labor relations matters that he did handle. For example, copies of correspondence sent to the union by Hendricks' attorneys were handed directly to Dillon by the office manager, without crossing Weatherman's desk, and reports on the status of ongoing union negotiations were personally delivered by Hendricks' attorneys to Dillon, who kept them in a private file behind his desk.[49] Moreover, Weatherman typed no internal memoranda concerning labor policies, and the only labor-related correspondence that she prepared were letters that she sent to Hendricks' attorneys transmitting the dates of union bargaining

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[47] Malleable notes (Br. Opp. 2 n.1) that it has also argued that 13 of these persons should be excluded from the bargaining unit as "managerial" employees, and that four of them should also be excluded as "supervisors." However, the court of appeals has not yet addressed these claims (Pet. App. 56a-59a), which therefore are not at issue here.

[48] *Brooklyn Daily Eagle, supra,* 13 N.L.R.B. at 986 & n.7, and its progeny—which deal with secretaries to executives who possess the "ultimate power of management" in its dealings with labor—are thus distinguishable.

[49] Compare *Illinois Consolidated Telephone Co., supra,* 61 N.L.R.B. at 454 (declining to treat as a "confidential employee" general auditor's secretary, who did not have access to his confidential labor relations reports).

sessions. On these facts, the finding of the Board and the court of appeals that Weatherman was not a confidential secretary with a "labor nexus" is manifestly correct.

Even if the legislative history of the Taft-Hartley amendments could be read to require the exclusion of confidential secretaries to all executives, without regard to any labor nexus, which it clearly cannot (see pages 24-29, 34-37, *supra*), the record here would provide no ground for excluding Weatherman under such a test.[50] Weatherman placed few of Dillon's phone calls, she did not memorialize their contents, she did not keep track of his appointments, she did not attend management or directors' meetings, and she was carefully shielded from access to such significant matters as the status of contract negotiations with the union (see pages 4-5, *supra*). Clearly, there has been no showing that Weatherman's "actual job responsibilities, authority, and relationship to management" (*NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 290 n.19) warrant her exclusion as a confidential secretary to an executive.

Finally, even if Weatherman were found to be a "confidential secretary"—and thus excludable from bargaining units composed of non-confidential employees—it would not follow that Hendricks was free to discharge her for engaging in protected, concerted activity. Because "confidential employees" are not excluded from the statutory definition of "employee" (Section 2(3) of the Act, 29 U.S.C. 152(3)), the Board has long held that truly

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[50] The decision below is not to the contrary. The court applied (Pet. App. 8a) the test enunicated in the 1947 House bill—a test that focuses not on an employee's confidential relationship to management, but on the nature of the information that passes through his hands—and rejected the Board's conclusion (*id.* at 20a) that Hendricks "simply did not have secret papers or documents." However, the court made no determination with respect to the status of Weatherman's purportedly "confidential" relationship to General Manager Dillon with respect to such papers or documents.

confidential employees—although excludable from rank-and-file bargaining units as a matter of sound labor policy—nevertheless enjoy the protection of the Act against employer unfair labor practices in circumstances such as those presented here. See page 18, note 14, *supra*. This position strikes a reasonable balance between employee rights expressly protected by Section 7 of the Act, 29 U.S.C. 157, and management's important interest in ensuring against the disclosure of confidential information. That Weatherman should be deemed to have been protected by the Act when she signed a petition calling for the reinstatement of a disabled fellow worker hardly impacts upon any interest in confidentiality that Hendricks might legitimately have.[51] Finally, whatever view the Eightieth Congress might have held concerning the Board's treatment of confidential secretaries (see pages 28-29, *supra*), the fact remains that after the Taft-Hartley amendments the Board continued its practice of excluding such persons from rank-and-file bargaining units, but not from statutory protection against unfair

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[51] Hendricks retains considerable power to ensure the confidentiality of such information: it can insist, as a condition of employment and on pain of discharge, that Weatherman keep to herself any knowledge that she might have of Hendricks' private affairs. See, *e.g.*, *American Window Glass Co.*, 77 N.L.R.B. 1030, 1032 (1948); see *Armour & Co.*, *supra*, 49 N.L.R.B. at 690-691. Moreover, the Board allows an employer such as Hendricks considerable leeway to engage in conduct (which might otherwise violate the Act) to protect its labor-related confidences from the union. Thus, an employer may question a confidential secretary about union membership, to determine whether he wishes to retain the secretary in a confidential capacity (*American Book-Stratford Press, Inc.*, *supra*, 80 N.L.R.B. at 915), and may transfer such an employee to a non-confidential job, so long as the transfer is effected to prevent possible disclosures of confidential matters (*Illinois Bell Telephone Co.*, 228 N.L.R.B. 942 n.1, 944 (1977); *Pope Maintenance Corp.*, 228 N.L.R.B. 326, 337-338 (1977), enforced, 573 F.2d 898 (5th Cir. 1978)), and not for the purpose of "punish[ing]" the employee for union activity (*Doxsee Food Corp.*, 218 N.L.R.B. 934, 935 (1975), enforced, mem., 529 F.2d 1030 (5th Cir. 1976)).

labor practices.[52] Indeed, this policy has continued without exception for more than 40 years.[53] In the intervening time, Congress has twice "reenacted the statute without pertinent change. * * * In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB* v. *Bell Aerospace Co., supra*, 416 U.S. at 275.

III. THE COURT OF APPEALS PROPERLY REJECTED HENDRICKS' CONTENTION THAT WEATHERMAN WAS A "PERSONNEL DEPARTMENT EMPLOYEE"

Hendricks contends (Cross-Pet. I-II) that the court of appeals erred in rejecting Hendricks' claim that Weatherman was a "personnel department employee" and therefore excluded from the coverage of the Act. As the court of appeals suggested (Cross-Pet. App. 27a; emphasis added), however, Hendricks' argument must be that Weatherman "work[ed] in a position *equivalent* to a personnel department employee" because Hendricks ac-

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[52] Compare *Detroit Harvester Co. (Dura Div.)*, 79 N.L.R.B. 1316, 1317-1318 (1948) (excluding confidential employees from rank-and-file bargaining unit), with *Coopersville Cooperative Elevator Co., supra*, 77 N.L.R.B. at 1084-1085 & n.6 (holding that confidential employees are entitled to statutory protection against unfair labor practices), and *American Book-Stratford Press, Inc., supra*, 80 N.L.R.B. at 915 (same).

[53] Significantly, Congress itself adopted a similar approach with respect to the treatment under the Act of plant guards, another class of employees whose membership in rank-and-file bargaining units may arguably create some conflict of interest. Thus, Section 2(12) of the House bill—which would have excluded guards from the Act altogether—was deleted in conference and replaced by a provision (now Section 9(b)(3) of the Act, 29 U.S.C. 159(b)(3)) that accords them statutory protection against unfair labor practices, but requires them to seek union representation separately from the rank-and-file. See H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947).

tually has no personnel department. Moreover, Weatherman had nothing to do with employee grievances, discipline, or reward, and the only confidential personnel-type materials that she handled were employees' medical and disability insurance claim forms (see pages 4-5, *supra*). As Judge Cudahy properly noted (Pet. App. 10a; emphasis in original), "these were the confidences of *employees* she had to keep," and it is "simply ludicrous that one should be classified as part of 'management' and lose the protection conferred on 'labor' because one is entrusted with the confidences of one's fellow workers." On these facts, the court of appeals correctly rejected (Pet. App. 27a) Hendricks' contention.[84]

Nor is there merit to Hendricks' further contention (Cross-Pet. 15-16) that the Board failed to rule on this issue in the first instance. Although the ALJ, whose decision was adopted by the Board, did not discuss Weatherman's status as a "personnel department employee" separately from her status as a "confidential employee" with a "labor nexus," the relevant portion of the ALJ's decision (Pet. App. 44a-49a) clearly shows that, in finding that Weatherman did not have any access to confidential labor-related information, he also found that her duties with respect to personnel matters (such as they were) were insufficient to affect her status as an employee entitled to the full protection of the Act.

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[84] Even if, contrary to the showing above, Weatherman were a personnel department employee, this would not require that she be accorded special treatment under the Act, because she had no access to labor relations information of a strategic or sensitive nature that could (if disclosed) compromise her employer's dealings with the union.

CONCLUSION

The judgments of the court of appeals should be reversed insofar as enforcement of the Board's orders was denied.

Respectfully submitted.

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APPENDIX

Section 2 of the National Labor Relations Act, 29 U.S.C. 152, provides in relevant part:

When used in this subchapter—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, * * * as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

* * * * *

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organi-

zation as a condition of employment as authorized in section 158(a)(3).

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), provides in relevant part:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit * * *.

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BRIEF FOR THE HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

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BRIEF FOR THE HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

STATEMENT OF THE CASE

1. The Board found that on May 9, 1977, the "top executive officer" and "General Manager" of the Hendricks County Rural Electric Membership Corporation (Hendricks or REMC) had discharged his personal secretary, Mary Weatherman, because she had signed a petition directed to the REMC's board of directors requesting that they reconsider the board's decision not to reinstate disabled Lloyd Hadley as an employee. Mr. Hadley became disabled in February, 1976, as a result of an employment accident, and in April, 1977, the board notified Hadley that he would not be reinstated as an employee. (P. App. 38a-39a) On the date of her discharge, Weatherman filed an unfair labor practice charge with the National Labor Relations Board, alleging that her discharge violated Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1). In addition to contesting the unfair labor practice, Hendricks claimed at the evidentiary hearing and in its Trial Brief that Weatherman was excluded from the coverage of the Act for two separate reasons: (1) As a "confidential employee" in her capactiy as secretary to the General Manager and top executive and operating officer of the employer, and (2) As a person working in "personnel and employment departments." Although the Administrative Law Judge (ALJ) specifically concluded "that Weatherman was not a confidential employee as the Board defines that term," he made no decision as to whether she was excluded from the Act as an employee working in "personnel and employment departments." (P. App. 49a)

However, the ALJ determined that Weatherman opened mail addressed to Hendricks and Dillon except for correspondence from Hendricks' lawyers to the union, kept and processed all insurance claims of employees, typed Manager Dillon's letters and notices as to the dates of labor negotiation meetings, typed minutes of the meetings of the REMC's board of directors including minutes containing references to Hadley's request for reinstatement and to

other personnel matters, and shared an office with Manager Dillon, separated only by a six foot high partition. Additionally, the ALJ stated that Dillon was present at labor negotiation meetings with the union and collected papers relating to labor contract negotiations including copies of positions developed by the REMC's negotiating committee and his notes taken during negotiations; and that Assistant Manager Spencer had testified that while he (Spencer) made determinations of "management policy concerning the interpretations of the labor contract with the IBEW" union, that such determinations were approved by Dillon; and that Dillon interviewed prospective employees and also considered labor relations problems with both union and non-union employees if not first resolved by Assistant Manager Spencer or Office Manager Douglass. (P. App. 45a-47a & N. 10)

Hendricks filed Exceptions to the Decision with the Board including both jurisdictional issues and the ALJ's failure to rule upon the issue of the exclusion of Weatherman from the Act's coverage due to the fact that she was a personnel and employment department employee. The Board adopted the Decision and Order of the ALJ without specifically ruling upon the Exceptions. (P. App. 33a-35a) Thereafter, Hendricks filed a Petition for Review with the U.S. Circuit Court of Appeals for the Seventh Circuit including the review of both jurisdictional issues and the failure of the Board to rule upon the personnel and employment department exclusion. Although concurring that she did not have a "confidential capacity with respect to labor relations policies," the Court of Appeals reversed the Board's Order. (P. App. 26a & 27a) The Court of Appeals after discussing the decision of the Supreme Court in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), held that "The legislative history of the Taft-Hartley Act, as interpreted in *Bell Aerospace*, requires the conclusion that *all* secretaries working in a confidential capacity, without regard to labor relations, be excluded

from the Act" and concluded that the ALJ had "limited his factual inquiry to a determination that Weatherman had not acted in a confidential capacity with respect to labor relations." The Court of Appeals remanded the case to the Board "for a determination of whether 'by the nature of [her] duties' she was 'given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.' H.R. 3020 §2 (12)(C), 80th Cong., 1st Sess. (1947)." (P. App. 31a) Additionally the Court stated that "The ALJ also found that Weatherman was not working in a position equivalent to a personnel department employee, a finding which we do not consider clearly erroneous." (P. App. 27a)

2. On October 10, 1979, the Board accepted the Court's remand and advised the parties that they may file "Statements of Position with the Board with respect to the issues raised by the remand." In its Statement of Position, Hendricks stated "that the Board should order a reopening of the proceedings to present further evidence regarding the issues on remand" and specifically pointed out to the Board that the REMC competes with another utility and was involved in litigation cases with that utility during Weatherman's employment. (P. App. 3a) The Board failed to rule upon Hendricks' request to reopen the record on remand, and issued its Supplemental Decision and Order on January 22, 1980, and stated therein that "Accepting the court's criteria for resolving questions of confidential employee status as the law of this case only, we find that Weatherman was not a confidential employee." (P. App. 18a & 19a) Hendricks again filed a Petition for Review with the Court of Appeals, which denied enforcement of the Order stating that "we adhere to everything we said in *Hendricks" I* and holding that the board had erred in not allowing a new evidentiary record and by not applying the Court's standard to define a confidential employee, stating:

The Board did not reopen the proceedings under the different standard, did not take any additional evidence, did not remand the proceedings to the administrative law judge who heard the original evidence, and has sent us the same record we reviewed before. We are asked to enforce an order which purports to apply the new standard to the old record, but actually reapplies the old standard incorporating the labor nexus. (P. App. 7a & 8a)

SUMMARY OF THE ARGUMENT

1A. In adopting the Taft-Hartley Act of 1947, Congress not only intended to exclude all true supervisors from the Act's coverage, but also two separate and distinct categories of employees: individuals "employed in labor relations, personnel, and employment...matters" and confidential employees. The latter category was defined by Congress in Section 2(12)(C) of the House bill as any individual "*who by the nature of his duties* is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer." Both in 1946 and again in 1947, Congress passed legislation in an attempt to prevent the Board's zealous interpretation of the term "employee" from extending the Act's coverage to employees normally considered managerial or aligned with management. Congress desired to insulate the employer from having to rely upon any one "whom, for *any* reason, he does not trust," and to protect the "intimate details of the business that frequently are highly confidential" from labor or from competitors. Although the language containing both of these exclusions was deleted by the conference committee, both the House Conference Report and the summary of Senator Taft indicate the conferees felt the exclusions unnecessary since the Board had treated and will continue to treat such persons as outside the scope of the Act.

Congress passed the Act by large majorities, overriding the veto of President Truman.

B. The Board's exclusion of "confidential employees" has been inconsistent, and many of its pre-1946 decisions relate the term "confidential employee" to persons dealing with labor relations *matters* such as personnel department employees and employees having mere access to personnel files or correspondence. However, prior to and for approximately ten years after the Act's passage, the Board excluded as a separate category employees who were either closely related to or aligned with the management. This category has included private secretaries and clerks to executives, staff assistants to department managers, secretaries and office clerks to managers, secretaries to grievance supervisors, timekeepers and others more closely aligned to management than are other ordinary employees. Not until after 1956, did the Board begin to consistently limit its previously recognized exclusions to those who assist in a confidential capacity to those who formulate, determine and effectuate management policies in the field of labor relations. During the next fifteen years, the Board eroded the confidential exclusions to non-existence, placed the labor relations policy limitation upon the separate exclusion of personnel, labor relations and employment personnel, and finally placed this limitation upon the exclusion of managerial employees.

C. As early as 1966, the Courts recognized that the Board over the years had excluded not only truly managerial employees from the Act but also employees closely related to or aligned with management so as to place the employee in a position of *potential* conflict of interest. The effort of the Board to dramatically increase its jurisdiction generated the detailed review of the legislative history of the Taft-Hartley Act in the early 1970s. The judicial review resulted in the resurrection of a true confidential exclusion with the Courts concluding that Congress had intended to exclude confidential employees

and managerial employees from the Act and had never intended that the exclusion be limited to only those involved in labor relation policy formulation and implementation.

D. The logical application of the true confidential exclusion as adopted by the Seventh Circuit in *Hendricks* is not a pervasive exclusion that will exclude countless numbers of individuals from the Act's coverage. Rather, the congressional exclusionary standard as resurrected by the judiciary merely recognizes the right of employers to have loyal employees in positions of trust who will not have a potential conflict of interest between the employer and other employees. Recent Board decisions graphically portray the Board's total lack of concern with employers' confidential information. Congress' belief that a confidential employee exclusion was necessary since protecting the employer's confidential information and vital secrets "ought not to rest in the administrative discretion of the Board or on the responsibility of whatever union happens to represent the employees" has been proven valid by the Board's decisions in the last ten years. The unreasonableness of the Board's application of its strict standard in *Hendricks* exemplifies the problem foretold by Congress in 1947.

2. The Court erred by holding that the Board had found secretary Weatherman was not working in a position equivalent to a personnel department employee, since the record indicates that no such finding was made by the Board. Indeed, an application of the separate exclusion for employees working in labor relations, personnel or employment departments results in the conclusion that this secretary should have been excluded from the Act's coverage even if the Board's definition of confidential employee is correct. This was the policy of the Board itself from 1940 to 1966, and a different result would discriminate against the small employer who does not have a separate personnel department.

ARGUMENT

I.

CONFIDENTIAL EMPLOYEES ARE PEOPLE WHO RECEIVE FROM THEIR EMPLOYERS INFORMATION THAT NOT ONLY IS CONFIDENTIAL BUT ALSO THAT IS NOT AVAILABLE TO THE PUBLIC, OR TO COMPETITORS, OR TO EMPLOYEES GENERALLY FOR USE IN THE INTEREST OF THE EMPLOYER; AND CONFIDENTIAL EMPLOYEES ARE EXCLUDED FROM THE COVERAGE OF THE NATIONAL LABOR RELATIONS ACT

A. The Legislative Recognition of the Confidential Employee Exclusion

The Congress of the United States in enacting the Taft-Hartley Act of 1947 (Labor-Management Relations Act) expressed its intent to exclude from the Act's coverage both confidential employees and individuals employed in labor relations, personnel or employment matters; and intended to exclude as confidential, people who receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally. Congressman Fred A. Hartley, Jr., writing Report No. 245 from the Committee on Education and Labor accompanying H.R. 3020 to the House of Representatives expressed the displeasure of the Committee with the Board's various and fluctuating interpretations of the term "employees" under the Wagner Act and the evil that Congress intended to correct, stating:

> (B) The next significant change in section 2(3) concerns "supervisors". The bill, by excluding foremen and other supervisory personnel from the

definition of "employee", deprives the Board of *jurisdiction* over them.

The evidence before the committee showed this to be one of the most important and most critical problems. When Congress passed the Labor Act, we were concerned, as we said in its preamble, with the welfare of "workers" and "wage earners", not of the boss. It was to protect workers and their unions against foremen, not to unionize foremen, that Congress passed the act....It was not until about 7 years after Congress passed the Labor Act that anyone asked the Labor Board to establish a unit composed of supervisors. Notwithstanding that in the act Congress had defined as an "employer" "any person acting in the interest of an employer", the Board held, in the first such case, that supervisors in coal mines are "employees", ... [H.R. Rep. 245, 80th Cong., 1st Sess. (1947) at 13]

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Management, like labor, must have faithful agents.— If we are to produce goods competitively and in such large quantities that many can buy them at low costs, then, just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to it persons not subject to influence or control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what pay they should receive for it, and to carry on the whole of labor relations.

Labor relations people negotiate labor agreements and handle disputes not settled in the shops. Employment and personnel people hire workers, and sometimes assign them to their departments. Plant policemen and guards prevent disorders and report misconduct of employees and of unions and their members. Time-study men help to fix the pace at which employees work and to determine the number

of men the work calls for. Doctors, nurses, safety engineers, and adjusters handle claims for disability benefits and investigate alleged hazards to safety and health.

Other employees handle intimate details of the business that frequently are highly confidential. Some affect the employer's relations with labor. Others affect its relation with its competitors. In neither case should the employee's loyalty be divided. That which affects the company's relations with its competitors certainly ought not to be open to members of a union that deals also with the firm's competitors. [*id.* at 16] (Emphasis added)

* * *

So, by this bill, Congress makes clear once more what it tried to make clear when, in passing the act, it defined as an "employer", not an "employee", any person "acting in the interest of an employer"; what it again made clear in taking up H.R. 2239 in 1943 and in dropping it when the Board decided the Maryland Drydock case, and what, for a third time, it made clear last year in passing the Case bill by a majority of about 2 to 1 and in barely falling short of enough votes to override the President's veto of that bill.

The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its "expertness," changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for <u>*any*</u> reason, he does not trust. [*id.* at 17]

Thus, H.R. 3020, as reported, excluded from the term "employee" "any individual employed as a supervisor" in

Section 2(3), and defined the word supervisor into four (4) separate categories.[1]

Mr. Hartley expressed the Committee's displeasure with the Board stating that "It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up." *id.* at 309. Additionally, in reporting the committee's definition of the term "supervisor" to the House, Mr. Hartley dwelled entirely upon the addition of and definition of the term "confidential employee," noting that he had already discussed the reasons for excluding employees with labor relations nexus (Subsections Ai, Aii, and B).

(12) "Supervisor": In the discussion of the definition of the term "employee," the reasons for

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[1] *Section* 2(1) the term "supervisor" means any individual—

(A) who has authority, in the interest of the employer—

(i) to hire, transfer, suspend, lay off, recall, promote, demote, discharge, assign, reward, or discipline any individuals employed by the employer, or to adjust their grievances, or to effectively recommend any such action; or

(ii) to determine, or make effective recommendations with respect to, the amount of wages earned by any individuals employed by the employer, or to apply, or to make effective recommendations with respect to the application of, the factors upon the basis of which the wages of any individuals employed by the employer are determined, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the exercise of independent judgment;

(B) who is employed in labor relations, personnel, employment, police, or time-study matters or in connection with claims matters of employees against employers, or who is employed to act in other respects for the employer in dealing with other individuals employed by the employer, or who is employed to secure and furnish to the employer information to be used by the employer in connection with any of the foregoing; or

(C) who *by the nature of his duties* is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.

excluding from that definition persons who act for employers in the employer's dealings with labor have been fully set forth. The substantive language of section 2(12) of the present bill is consistent with that of the Case bill, which passed Congress last year.[2] The only important change concerns confidential employees. These are people who receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally. Most of the people who would qualify as "confidential" employees are executives and are excluded from the act in any event.

The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these. But protecting confidential financial information from competitors and speculators, protecting secret processes and experiments from competitors, and protecting other vital secrets ought not to rest in the administrative discretion of the Board or on the responsibility of whatever union happens to represent the employees. The bill therefore excludes from the definition of employees persons holding positions of trust and confidence whose duties give them secret information. The bill does not forbid these people to organize. It merely leaves their organizing and bargaining activities outside the provisions of the act. [*id.* at 23]

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[2] The Case bill, as passed, defined three (3) categories of supervisors:

"Supervisory employees: (a) As used in this section the term 'supervisory employee' means an employee whose primary duties consist of:

(1) the direction of supervision of the activities of other employees but who regularly do no productive manual work; or

(2) the computation of the pay of other employees and does not include persons who are selected by productive workers under established practice; or

(3) the determination of the time worked by other employees, or the supervision or administration of the factors on the basis of which the pay of other employees is computed."

Obviously, the House committee intended to exclude "confidential employees" from the definition of "employee" as a type of "supervisor" and intended "confidential employees" specified in Section 2(12)(C) to constitute a different exclusion than the exclusion of those "employed in labor relations, personnel, employment, police, or time-study matters or... employed to act in other respects for the employer in dealing with other individuals employed" as specified in Section 2(12)(B). The subsection (C) exclusion was not limited to labor relations, personnel or employment matters. The House passed H.R. 3020 with Section 2(12) unchanged.

However, since H.R. 3020 as reported and as passed by the Senate[3] did not contain the same definition of the term "supervisor" as in the House bill, a conference committee was established by Congress which included Congressman Hartley and Senator Robert A. Taft among its members. The Report of the Senate Committee on Labor and Public Welfare, written by Senator Taft, had discussed as its only concern in drafting the supervisor exclusion, its desire not to exclude "certain employees with minor supervisory duties" such as "straw bosses, leadmen, set-up men, and other minor supervisory employees." *Senate Rep. No. 105*, 80th Cong., 1st Sess. (1947) 410. Although the Senate's version of the definition for "supervisor" was adopted by the conference committee, both the Statement of the House Managers attached to the Conference Report and Senator Taft's summary in detail regarding the conference committee's report to the Senate, stated that the House bill

[3] Sec. 2. (11) The term "supervisor" means any individual having authority, in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. H.R. 3020 as passed Senate, 80th Cong., 1st Sess. (1947), 74.

had included "(A) certain personnel who fix the amount of wages earned by other employees, such as inspectors, checkers, weighmasters, and time-study personnel (B) labor relations personnel, police, and claims personnel, and (C) confidential employees" and thereafter stated as follows:

> In the case of persons working in labor relations, personnel and employment divisions [departments], it was not thought necessary to make specific provision, as was done in the House bill, since the Board had [has] treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. The conference agreement does not treat time-study personnel or guards as supervisors, as did the House bill. [H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947); 93 Cong. Rec. 6599 (1947), *Legis. Hist.* at 539 and 1537.]

Thereafter, both reports discuss the resolution of the committee regarding the House Bill's exclusion of guards and time-study employees. "The entire [House Conference] report was submitted to both houses of Congress and accepted on this hypothesis. 93 Cong. Rec. 6392-93, 6535-36 (1947)." *NLRB v. Wheeling Electric Co.*, 444 F.2d 783, 785 (1971) (4th Cir. 1971).[4]

After the conference report with the Statement of the Managers was presented and printed in the Congressional

[4] Similar reviews of the legislative history of the Taft-Hartley Act to determine the intention of Congress regarding the exclusion of confidential employees from the Act's coverage have previously been accomplished by this Court and several Courts of Appeals. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 279-284 (1974); *NLRB v. Wheeling Electric Co., supra*, at 785; *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1112 (7th Cir. 1973); *Bell Aerospace v. NLRB*, 475 F.2d 485, 490-494 (2nd Cir. 1973); *NLRB v. North Arkansas Electric Cooperative, Inc.*, 446 F.2d 602, 604-607 (8th Cir. 1971).

Record, the House adopted the report on June 4, 1947, by a vote of 320 yeas and 79 nays. Likewise, and after the summary presentation by Senator Taft on June 5, 1947, the Senate agreed to the conference report on June 6, 1947, by a vote of 54 yeas and 17 nays. 93 Cong. Rec. 6548 & 6694, *Leg. Hist.* 899 & 1620. Overriding the veto of the Act by President Truman, the House again passed the bill on June 20, 1947, as did the Senate on June 23, 1947. The House Committee Report of April 11, 1947, the Statement of the Managers attached to the House Conference Report of June 3, 1947, and the Summary in Detail of Senator Taft presented to the Senate on June 5, 1947, all express the congressional belief that the Board had itself excluded from the Act's coverage confidential secretaries as well as labor relations personnel and employment department employees, as separate categories of exclusion. The congressional intent was to exclude three categories of employees from the Act's coverage: true supervisors; labor relations, personnel and employment department employees; and confidential employees. Secondly, the intent of Congress was to exclude as confidential any employee "*who by the nature of his duties* is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer." Realizing that some employees handle confidential information affecting the employer's relations with labor and others handle confidential information affecting its relations with its competitors, Congress believed that "in neither case should the employee's loyalty be divided."

B. The Administrative Erosion of the Confidential Employee Exclusion

The Board's policy in applying the confidential employee exclusion has varied over the years, and at times inconsistent decisions were rendered during the same brief

time frames. The confidential exclusion was co-mingled with the exclusion for managerial employees, and at other times with the exclusion for those employed in labor relations, personnel or employment matters. Mr. Chief Justice Burger expressing the unanimous view of the District of Columbia Circuit Court panel stated that the "Board has not developed clear standards for determining what is a managerial employee," with the Court recognizing that at least two separate categories seem to exist. *Retail Clerks International v. NLRB*, 366 F.2d 642, 644 (D. C. Cir. 1966). In 1941 the Board in *Creamery Package Manufacturing Co.*, 34 NLRB 108, 110 and 111, held that the "possession of important information is of itself insufficient to justify exclusion from the right to collective bargaining" finding several employees not to be confidential since they did not possess information which "relates directly to the problem of labor relations." (Blueprint-machinery operator, draftsmen, reception clerk and telephone operator, assistants to cost accountant, stock record clerks, and typists) However, the Board did exclude a stenographer making reports to the general office stating that "the information which she *might* receive in this manner would appear to be confidential and directly related to the problem of labor relations." Two months later the Board excluded from a unit assistants working closely with the personnel director citing *Creamery, supra*, but as a separate category excluded secretaries of the store managers merely stating that "in the category of confidential secretaries or clerks, the unions seek to exclude the private secretaries of managers." *Montgomery Ward & Co.*, 36 NLRB 69, 72 and 73 (1941); citing *E. P. Dutton*, 33 NLRB, No. 134. The Board excluded an authorization clerk "charged with the custody of the service record cards of all employees" stating only that the "record cards contain confidential data." *Western Union Telegraph*, 38 NLRB 492, 500 (1942).

Several interesting Board decisions appeared in 1943. In *Bendix Aviation Corp.*, 47 NLRB 43, 47, the Board excluded both timekeepers and expeditors without reference to any labor relations nexus and merely noting that "its timekeepers are clerical and its expediters are *closely related to the management.*" Citing *Yale & Towne Manufacturing Co.*, 44 NLRB 1259 (1942), the Board excluded expeditors, stock chasers, hurryclerks and dispatchers from a unit of maintenance and production employees, and also excluded timekeepers and clerical employees without reference to labor relations. *New Britain Machine Co.*, 48 NLRB 263, 266 (1943). Most interesting was the Board's decision that year in *Consolidated Vultee Aircraft Corp.*, 54 NLRB 103, 106 & 107 (1943), excluding the entire labor relations section of the industrial relation department "inasmuch as the record indicates, in each instance, that these employees are either confidential employees, in that they have access to information pertaining to labor relations, or possess supervisory authority." Although equating the confidential exclusion with the exclusion for those employed in labor relations departments, the Board in *Consolidated* then as a separate category excluded staff assistants having "alleged confidential relationship to management" or "alleged supervisory status."[5]

In 1944 the Board excluded stenographers and clerks to a foreman stating that "All matters pertaining to the operation and administration of their respective departments, including confidential communications referring to labor relations, grievances, and other matters of similar import, pass through their hands"; and yet, also

[5] These included staff assistants to the chief and assistant chief of the subcontracting department, the staff assistant to the spares control supervisor in the production control department and a staff assistant to the general foreman in charge of the production stores in the material department, and with no reference to access to labor relations and only recognizing that the subcontracting department chief or his staff assistants had the authority to hire and discharge.

excluded timekeepers stating merely that they had an "intimate and immediate effect upon the setting of wages and costs," and excluded employment department employees who had "free access to all personnel and employment records." *Youngstown Sheet & Tube Co.*, 56 NLRB 559, 561 & 562 (1944). The Board next excluded time-study men whose determinations did not affect earnings of the unit employees holding that "their interests and functions are sufficiently akin to those of management to warrant their exclusion," and also holding they could not form a separate unit. *Yale & Towne Manufacturing Co.*, 60 NLRB 626, 628 & 629 (1945). Therefore, although excluding from units and the Act employees "who in the normal performance of their duties *may obtain* advance information of the Company's position with regard to contract negotiations, the disposition of grievances, or other labor relations matters," *Hoover Co.*, 55 NLRB 1321, 1323 (1944), the Board had also excluded certain types of employees who were neither supervisors nor had access to confidential labor relations matters but nonetheless had "interests and functions which are more closely aligned to those of management than are the interests and functions of the ordinary employees of the Company."[6] *Burke Brewery, Inc.*, 54 NLRB 1061, 1062 (1944).

In *American Smelting and Refining Co.*, 61 NLRB 506, 508 & 509 (1945), the Board excluded the assistant to the safety inspector and personnel director having "access, *in the normal course of his duties*, to confidential personnel records," the head timekeeper having "access to confidential personnel records...as a confidential employee," the manager's secretary having "access to personnel files" only, and the superintendent's secretary handling "all personnel correspondence" only. Likewise,

[6] Citing *Westinghouse Electric Co.*, 45 NLRB 826 at 829 (1942) and noting "The Board has frequently excluded from an appropriate unit employees who are on an intimate relationship with officers of the company.

the Board held that clerks in charge of personnel records occupied a "confidential status with respect to management." *Douglas Aircraft Co., Inc.*, 60 NLRB 876, 881 (1945); and excluded as confidential "all employees of personnel departments or employees otherwise engaged in personnel work, since through access to personnel files, or in the performance of their duties, they acquire information pertaining to confidential labor relations matters." *Aluminum Company of America*, 61 NLRB 1066, 1073 (1945). See also *Inland Steel Container Co.*, 56 NLRB 138, 140 (1944).

However, during the year that the predecessor to the Taft-Hartley Act was passed by Congress but vetoed by President Truman (the Case bill), 92 Cong. Rec. 1070, 5739, 5946, 6674; the Board issued its *Ford Motor Co.* decision, 66 NLRB 1317 (1946) specifically overruling *Yale & Towne Manufacturing Co., supra*, and *Consolidated Vultee Aircraft Corp., supra*. The *Ford* decision came soon after *Packard Motor Car Co.*, 61 NLRB 4 (1945), 330 U.S. 485 (1947), and during a period of intense disagreement between the Board and President Truman on the one side and Congress on the other when "As a result of the Board's ruling in the *Packard* case, both Houses of Congress, by overwhelming majorities, passed the so-called Case bill, exempting supervisors from the operation of the Labor Act. The President vetoed the bill, and the Board continued to unionize foremen at an accelerated pace." H.R. Rep. No. 245, at 14. Thus, while Congress was formulating its intent to exclude several categories of employees from the Act,[7] the Board reversed its own precedents holding that it would exclude "only those employees who assist and act in a confidential capacity to persons who exercise 'managerial'

[7] As noted in H.R. Rep. No. 245, at 13, the House, as early as 1943, was considering a bill to remove foremen from the Labor Act (H.R. 2239, 78th Cong.), which was dropped in 1943 when the Board, in *Maryland Drydock Co.*, 49 NLRB 733, reversed its 1942 decisions which had allowed foremen to join rank and file workers unions.

functions in the field of labor relations." *Ford Motor, supra,* at 1322. Nevertheless, the Board in *Ford, supra,* at 1324, went on to exclude a general clerk noting only that he "handles all group insurance records, approves and pays claims for disability and hospitalization, and passes upon expense accounts of the traveling salesmen."[8] The intent of the Board to limit the types of individuals previously excluded as confidential during its dispute with Congress is revealed by its decision issued in January of 1947, in *Consolidated Vultee Aircraft Corp.*, 71 NLRB 1350, 1363, where the Board reversed its prior exclusion of staff assistants to supervisors without even access to labor relations matters.[9]

Although the Board had thus quickly attempted to restrict the confidential employee category by eliminating prior exclusions of employees with no access to labor relations matters and by stating that access alone was not sufficient, the Board's policy reverted back in some decisions shortly after the 1947 passage of the Taft-Hartley Act. The Board excluded the private secretary to the general manager and president noting that although she did not presently perform duties with respect to matters concerning labor relations, she might in the future perform such duties. *W. K. B. H., Inc.*, 81 NLRB 63, 64 N.2 (1949). It excluded as confidential the secretary to the district manager who did not participate directly in bargaining negotiations but was consulted by the personnel manager, stating that "his secretary will have access to correspondence and other material relating to such

[8] In the case of *Hendricks County REMC* now being reviewed, the personal secretary to the General Manager and chief executive officer handled all group insurance records regarding claims for disability, hospitalization, and medical.

[9] The Board in *Consolidated Vultee II, supra,* included many staff assistants as well as timekeepers in the bargaining unit, while in *Consolidated Vultee I,* 54 NLRB 103, 112 (1943), the Board excluded time-study men and administrative assistants as "closely allied to management."

matters." *Two States Telephone Co.*, 90 NLRB 2008, 2011 (1950). The head cashiers in each of the company's stores were excluded as confidential since they had "access to all confidential memoranda sent to the store manager concerning labor relations policy and all other instructions concerning employment conditions and rates of pay." *Bond Stores, Inc.*, 99 NLRB 1029, 1031, N.4 (1952). In *Star Bush Manufacturing Co.*, 100 NLRB 679, 680 (1952) the Board excluded "the secretary to the Employer's general manager who participates in contract negotiations and other labor relations matters" without making any finding of the secretary's acts regarding or possession of labor relations matters. Likewise, the Board excluded as confidential the secretaries to the order department manager, the production control manager and the plant superintendent. *Minneapolis-Honeywell Regulator Co.*, 107 NLRB 1191, 1192 (1954). Expressing again its desire to overrule cases inconsistent with the definitions established in *Ford Motor Company, supra*, the Board thereafter held:

> Although announcing its intention in the *Ford Motor Company* case to limit the term "confidential" so as to embrace only such employees, the Board has, from time to time since that decision, expanded its view as to what constitutes a confidential employee by designating as "confidential," for example, secretaries to persons involved in the handling of grievances and cashiers having access to labor relation policy data. [*B. F. Goodrich Company*, 115 NLRB 722, 725 (1956).]

Nevertheless, the Board in *B. F. Goodrich* still excluded as confidential the secretaries to the personnel manager and to the office manager, noting merely that the latter had a role in past and future bargaining negotiations and handled grievances from employees. Also in 1956, truck drivers making purchases of produce on routes at pre-established prices were excluded, the Board stating as follows in *Swift & Company*, 115 NLRB 752, 753 & 754:

> It was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management. Such individuals cannot be deemed to be employees for the purposes of the Act. [Cited in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 287.]

The normally consistent limitation and erosion of the confidential exclusion seems to have begun ten years after the Taft-Hartley Act of 1947. In 1966, the Board attacked the long-recognized exclusion of persons employed in labor relations, personnel and employment matters by holding that secretaries and clerks who kept time and work records and typed memoranda dealing with personnel matters were not "sufficiently concerned with labor relations matters to be considered confidential employees who should be excluded from the unit" since they did not actually "assist or act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *Hotel Employer's Association*, 159 NLRB 143, 150 (1966). See also, *John Sexton & Co.*, 224 NLRB 1341 (1976) (employee typing personnel matters including employee status changes and who files handwritten evaluations and other items in personnel files is not excluded as a confidential employee.) In *Weyerhaeuser Co.*, 173 NLRB 1170, 1172 & 1173 (1968), the secretaries to supervisors who processed employee grievances as the employer's representative on standing joint union-management committees were included under the Act since the supervisors only applied the provisions of the existing bargaining contract to pending grievances and did not actually formulate or determine the labor policies. The culmination of the Board's destruction of the confidential exclusion seemingly occurred in 1972 in *Peerless of America, Inc.*, 198 NLRB 982, 987, wherein the Board held that the company had committed unfair labor practices pursuant to Section 8(a)(1) against the rights of the private secretary to the plant manager on three occasions when she overheard from her desk his

conversations with several supervisors in his private office regarding the union sympathies of other employees during a unionization effort. In 1970, the Board found an unfair labor practice when the manager of one of the company's offices discharged his confidential secretary who had refused to perform her duties during a strike by other employees. *Wheeling Electric Co.*, 182 NLRB 218. While eliminating the confidential employee exclusion, the Board also turned its attention to applying the "labor relations policies" limitation to its long-recognized exclusion of those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer," which was the other category of employees discussed in *Ford Motor Co., supra*, in 1946. *North Arkansas Electric Cooperative, Inc.*, 168 NLRB 921 (1967), 185 NLRB 550 (1970); *Bell Aerospace Co.*, 190 NLRB 431 (1971) and 196 NLRB 827 (1972). With 1978 came the *Hendricks* decision, 236 NLRB 1616 (1978), wherein the Board determined that the personal secretary to the General Manager and chief executive officer of the company was not a confidential employee excluded from the coverage of the Act. These decisions of the Board proved to be the straws which broke the camel's back and generated reviews of the intent of Congress and reversals by the Courts.

C. The Judicial Resurrection of the Confidential Employee Exclusion

The judicial resurrection of the confidential employee exclusion began even while the administrative erosion continued. Oftentimes, the courts discussed this exclusion in connection with the "managerial" exclusion, but at other times the courts discussed the "confidential" exclusion separately. As early as 1954, the Ninth Circuit Court of Appeals determined that the "reports which accompanied the legislative bill which Congress enacted into the Labor Management Relations Act of 1947, made [it] abundantly

clear that a primary objective of Section 2(11) of the Act...was to assure to the employer his right to procure the loyalty and efficiency of his supervisors and managers." *NLRB v. Retail Clerks International*, 211 F.2d 759, 763 (9th Cir. 1954). In 1963, the Fourth Circuit reversed the Board's inclusion of the office clerk who was privy to confidential communications of the district manager regarding performance, pay, and termination recommendations. *NLRB v. Quaker City Life Insurance Co.*, 319 F.2d 690, 694 (4th Cir., 1963). Thereafter, in *Retail Clerks International v. NLRB*, 366 F.2d 642, 644 & 645 (D.C. Cir. 1966), *cert. denied* 386 U.S. 1017, the D. C. Circuit, in an opinion by then Circuit Judge Burger, recognized that although the "Board has not developed clear standards for determining what is a managerial employee" that two tests and categories seem to exist, stating as follows:

> The first is whether, even if they do not supervise other workers, their position with the employer presents a potential conflict of interest between the employer and the workers, *e.g.*, employment interviewers who have authority in hiring, New England Telephone, 90 N.L.R.B. 639 (1950). *This strand of the managerial employee test is often phrased in a more conclusory manner, i.e., that the employee is closely related to or aligned with the management; such a determination, however, also seems to turn on the possibility of a conflict of interest arising, e.g.*, timekeepers and expeditors, Bendix Aviation Corp., 47 N.L.R.B. 43 (1943); an office manager and record keeper who has no confidential information about other employees, Burke Brewery, Inc., 54 N.L.R.B. 1061 (1944).
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> The Board also excludes from the protection of the Act, as managerial employees, "those who formulate, determine, and effectuate an employer's policies," AFL-CIO, supra, at 973, and those who have discretion in the performance of their jobs, but not if the discretion must conform to an employer's established

> policy, Eastern Camera & Photo Corp., 140 N.L.R.B. 569, 571 (1963) (store managers who could set prices are not managerial). *The rationale for this Board policy, though unarticulated, seems to be the reasonable belief that Congress intended to exclude from the protection of the Act those who comprised a part of "management" or were allied with it on the theory that they were the one from whom the workers needed protection.* (Emphasis added)

Thus, the Circuit Court discovered that the Board had excluded from the protection of the Act a certain "strand of managerial employee" who did not supervise other workers, did not possess confidential information about other employees, and yet did not formulate, determine, and effectuate an employer's policies. Chief Justice Burger noted in discussing this type of managerial employee that "In some instances the test of alliance with management is applied even where a conflict of interest is not apparent."[10] The recognition of the existence and the definition of two distinct cagegories of employees comprising the "managerial" exclusion as set forth in *Retail Clerks, id.*, was adopted by the Seventh Circuit in *Illinois State Journal-Register, Inc. v. NLRB*, 412 F.2d 37, 41 (7th Cir. 1969) and *Westinghouse Electric Corporation v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), wherein the Court stated that "the fundamental tests to be used in determining whether an individual is such a 'managerial' employee are: (1) whether the employee is 'so closely related to or aligned with management as to place the employee in a position of *potential conflict of interest* between his employer on the one hand and his fellow workers on the other,' and (2) 'whether

[10]Citing *Federal Tel. and Tel. Co.*, 120 NLRB 1652 (1958), buyers; *Diana Shop Spokane, Inc.*, 118 NLRB 743 (1957), credit managers who have authority to grant credit in limited amounts to customers; and *Swift & Company*, 115 NLRB 752 (1956), truck drivers who buy eggs from farmers for the account of the truck driver's employer.

the employee is formulating, determining and effectuating his employer's policies or has discretion, independent of an employer's established policy, in the performance of his duties.'" (Emphasis added). As noted at Page 10, Congressman Hartley stated in the House Report that neither in the case of "highly confidential" information affecting relations with labor or relations with competitors "should the employee's loyalty be divided," and "That which affects the company's relations with its competitors certainly ought not to be opened to members of a union that deals also with the firm's competitors."

However, a thorough analysis of the legislative history of the Taft-Hartley Act itself did not begin until the early 1970s. In *NLRB v. Wheeling Electric Co.*, 444 F.2d 783, 788 (4th Cir. 1971), the Court excluded from the Act's coverage the confidential secretary to an office manager stating:

> A confidential secretary who plights her troth with the union differs in form, but not in substance, from one who holds a union card. Since she cannot formally join the unit, there is nothing incongruous in holding that she cannot "plight her troth" with the unit. Indeed, it seems more consistent to say that if she cannot act in concert by participating in the unit, then she cannot act in concert on an informal basis, or more accurately, that if she does so, it will be without the protection of the Act. Management is entitled to security of its confidential information and may insist upon the loyalty of those employees who have access to it. For this reason, confidential employees cannot be granted the protection afforded ordinary employees under the Act. Like supervisors, "such loyalty cannot be secured if [they] are psychologically allied with, or subject to the pressures of their union on behalf of, the rank and file." Cox, *supra*, [*The Labor Management Relations Act*, 61 HARV. L. REV. 1,] at 5 (1947).

Additionally, the Court found in *Wheeling Electric*, *id.*, at 786, that the Board did not point to a single case in which it had certified a bargaining unit made up entirely of

confidential employees and found that the "treatment of confidential employees by the Board before 1947 could therefore be properly construed by the Congress as it did—that they were not to be afforded the protection of the Act." In *NLRB v. North Arkansas Electric Cooperative, Inc.*, 446 F.2d 602, 607 (8th Cir. 1971), the Court held as follows:

> It is apparent that in passing the Labor-Management Relations Act of 1947, Congress understood that persons working in labor relations, personnel and employment divisions *and as confidential employees* had theretofore been treated as "outside the scope of the Act," and that it was the intention of the conferees this practice be continued under the 1947 amendments. (Emphasis added).

Thus, the Eighth Circuit concluded that "confidential employees" was a separate exclusion from "persons working in labor relations, personnel and employment divisions", with the Court relying upon the conference report submitted to the Senate by Senator Taft and the definition of the term confidential employee as contained in Section 2(12), 93 Cong. Rec. 6548, *Leg. Hist.* 897-900. The Court concluded:

> The legislative history cited above, together with the logical analysis thereof in the recent *Wheeling Electric Company* case, clearly indicate that labor relations and employment division personnel and confidential employees are not intended to be protected by the Act. If none of *these classes of employees* is protected, it is not logical to assume that Congress intended to protect managerial employees who are so closely aligned with management as to be excluded from the bargaining unit and who had not been held to be "employees" by the Board prior to the 1947 amendments. [*id.* at 610] (Emphasis added)

The Eighth Circuit denied enforcement of the Board's order to rehire stating only that the Board's assertion that "there is nothing in the record to suggest that he

participated in the formulation, determination, or effectuation of policy *with respect to employee relations matters*" "not only conveniently ignores our prior holding that Lenox 'assisted in conducted employee training sessions,' but in our view, also improperly limits the class of employees not protected by the Act."[11]

In essence, the judicial resurrection of the confidential "exclusion" was completed in the years 1973 and 1974. The Seventh Circuit in *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (1973) (Justice Stevens concurring) adopted the Fourth Circuit's decision in *Wheeling Electric Co., supra*, noting that the *Wheeling* case had recently been approved by the Second Circuit in *Bell Aerospace Co. v. NLRB*, 475 F.2d 485, 494 (1973). *Peerless* reversed the Board's decision finding that the company had thrice violated Section 8(a)(1) of the Act committing an unfair labor practice when the plant manager's confidential secretary overheard his conversations with supervisors regarding the sympathies of other employees during a union organizational campaign. The Court held that the secretary was not protected under the Act. Also in 1973, the Second Circuit issued its second opinion in *Bell Aerospace Co. v. NLRB*, 475 F.2d 485 (1973). The Board in *Bell Aerospace* had held that managerial employers were excluded from coverage

[11] In recognizing that the class of confidential employees is separate from the class of labor relations and employment division personnel, the court stated: "While not controlling, the Court is entitled to give considerable weight to the construction of a statute by the administrative agency entrusted with its execution when that statute has been subsequently considered by Congress and not materially amended." *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367, 381 (1969); *Zemel v. Rusk*, 381 U.S. 1, 8-11 (1965); *Commissioner v. Noel Estate*, 380 U.S. 678, 682 (1965); *NLRB v. Gullett Gin Company*, 340 U.S. 361, 365-366 (1951); *Helvering v. R. J. Reynolds Tobacco Company*, 306 U.S. 110, 114-115 (1939). The court stated that "This is especially true here where Congress enacted an amendment excluding supervisors from coverage after they had been included by Board interpretation but did not make reference to 'managerial employees' who had not been so included."

only if they make "determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization." "This category included not only 'those concerned with management policies in the labor relations area,' but also those having 'responsibility with respect to policies which are inextricably intertwined and of necessity affect or infringe upon the labor relations area.'" After the thorough discussion of the four separate exclusions specified in the House version of H.R. 3020 and the definition of confidential employee contained in House Report No. 245 at 14 and 15, and of Senate Report No. 105 at 4 and 5 by Senator Taft, and of the House Conference Report No. 510 at 35 and 36; Chief Judge Friendly concluded as follows:

> The best we can make of this history is as follows: The Senate had been persuaded that the House definition would have barred from the protection of the Act too many people who should be within it.[12] But neither the Senate, nor the House in yielding to it, thought the exclusion would be limited to persons precisely fitting the Act's definition of "supervisor." It is quite clear—and the Board does not challenge this—that Congress believed "persons working in the labor relations, personnel and employment departments" would be excluded. However, our sense of the situation

[12]Previously, Chief Judge Friendly noted the only concern expressed by the Senate: "But while the Senate Committee was concerned with distinguishing between supervisors vested with 'genuine management prerogatives,' such as the power to hire, fire, or discipline other employees, and minor supervisors such as 'straw bosses, leadmen, [and] set-up men,' it expressed the same concerns that had been voiced by the House Committee over the granting of the Act's protections to supervisory personnel. S. Rep. No. 105, *supra*, at 4-5. The Senate Committee felt that the organization of supervisors had upset the balance of power between labor and management, id., at 3, and it wished to prevent conflicts of interest, resulting in lower productivity, less discipline, and correspondingly higher industrial accident rate, *id.* at 4-5." 475 F.2d 485 at 490.

> is that Congress recognized there were other persons so much more clearly "managerial" that it was inconceivable that the Board would treat them as employees. Surely Congress could not have supposed that, while "confidential secretaries" could not be organized, their bosses could be.[13] In other words, Congress failed to enact the portion of Mr. Justice Douglas' *Packard* dissent relating to the organization of executives, not because it disagreed but because it deemed this unnecessary. [*id.* at 491 & 492]

Noting the Board's decision in 1956 in *Swift & Company*, 115 NLRB 752, 753, later reversed by the Board, the Second Circuit then adopted the exclusion of confidential employees from the Act's coverage presented in "the illuminating opinion of Judge Craven, dealing with a confidential secretary," in *Wheeling Electric, supra*, and the Eighth Circuit's decision in *North Arkansas Electric, supra*, and held as follows:

> The conclusion we reach from all of the foregoing is this: The 1947 Congress clearly believed that at least some "managerial employees" other than "supervisors" were excluded from the protections of the Act.[14] In 1956 the board concluded that the Congress had meant

[13]Footnote 10 of Court. "We think that when the Conference Report referred to 'confidential secretaries,' it used that term with the same meaning which H.R. 3020, as reported, had spelled out for 'confidential employees,' even though in 1946, the Board had narrowed its definition of confidential employees to those "who exercise 'managerial' functions in the field of labor relations." Ford Motor Co., 66 N.L.R.B. 1317, 1322."

[14]Court's footnote 13. Congress may have misapprehended the Board's pre-1947 practice with regard to confidential employees. As indicated in the case cited in fn. 10 [*Ford Motor Company*], the Board had apparently excluded such employees from bargaining units of rank and file personnel but had not ruled that they were unprotected by the Act. Thus, when the Conference Committee stated that the Board had treated these employees "as outside the scope of the Act," it may have been in error. Nevertheless, since Congress' reason for not expanding the definition of supervisor was its belief that existing Board practices made this unnecessary, that intent should be given effect. See *NLRB v. Wheeling Elec. Co.*, 444 F.2d 783 (4th Cir. 1971).

> to exclude all true "managerial employees." This exclusion embraced not only an employee "so closely related to or aligned with management as to place the employee in a position of conflict of interest between his employer on the one hand and his fellow workers on the other" but also one who is "formulating, determining and effectuating his employer's policies or has discretion, independent of an employer's established policy, in the performance of his duties." *Illinois State Journal-Register, Inc. v. NLRB*, 412 F.2d 37, 41 (7th Cir. 1969). *id.* at 494.

The Second Circuit in *Bell Aerospace* had concluded that the Conference Report had referred to the term "confidential secretaries," "with the same meaning which H.R. 3020, as reported, had spelled out for 'confidential employees,'" which was, "any individual (C) who *by the nature of his duties* is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer."

As this Court is certainly aware, both the decision and the rationale of the Second Circuit was basically adopted by this Court in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). The major issue decided by the Court was the "question whether all 'managerial employees,' rather than just those in positions susceptible to conflicts of interest in labor relations, are excluded from the protections of the Act." *id.* at 274. Rejecting the "labor relations" limitation, this Court held that the buyers were excluded from the coverage of the Act as the category of "managerial employees" who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *id.* at 282-285 and 288. This Court adopted the Second Circuit's statement that "surely Congress could not have supposed that, while 'confidential secretaries' could not be organized, their bosses could be," and discussed the Act's history as follows, *id.* at 283 and 284:

> The legislative history of the Taft-Hartley Act of 1947 may be summarized as follows. The House wanted to include certain persons within the definition of "supervisors," such as straw bosses, whom the Senate believed should be protected by the Act. As to these persons, the Senate's view prevailed. There were other persons, however, who both the House and the Senate believed were plainly outside the Act. The House wanted to make the exclusion of certain of these persons explicit. In the conference agreement, representatives from both the House and the Senate agreed that a specific provision was unnecessary since the Board had long regarded such persons as outside the Act. Among those mentioned as impliedly excluded were persons working in "labor relations, personnel and employment departments," and "confidential employees." But assuredly this did not exhaust the universe of such excluded persons. The legislative history strongly suggests that there also were other employees, much higher in the managerial structure, who were likewise regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary. For example, in its discussion of confidential employees, the House Report noted that "[m]ost of the people who would qualify as 'confidential' employees are *executives and are excluded from the act in any event.*" H.R. Rep. 245, p. 23 (emphasis added.)[12] We think the inference is plain that "managerial employees" were paramount among this impliedly excluded group.

The Court specifically recognized that the definition of "confidential employees" in the House Report was not limited to the labor relations area, and therefore concluded that the other class of managerial employees, i.e. those who formulate and effectuate management policies by expressing and making operative the decision of their employer, was not limited to the labor relations area, stating, *id.* at 283 and 284, N. 12:

> The Report stated in reference to "confidential employees": There are people who receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally. *Most of the people who would qualify as 'confidential' employees are executives and are excluded from the act in any event.*
>
> "The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these." *Ibid.* (Emphasis added by Court)
>
> In 1946 in *Ford Motor Co.*, 66 N. L. R. B. 1317, 1322, the Board had narrowed its definition of "confidential employees" to embrace only those who exercised "'managerial' functions in the field of labor relations." The discussion of "confidential employees" in both the House and Conference Committe Reports, however unmistakably refers to that term as defined in the House bill, which was not limited just to those in "labor relations." Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.

The Court reaffirmed this rationale in *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980) noting that the college professors "are 'much higher in the managerial structure' than those explicitly mentioned by Congress, which 'regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary.' 416 US, at 283," and stating at N.16 that "The Board has found decisions of far less significance to the employer to be managerial when the affected employees were aligned with management."[15] Even the minority opinion issued by

[15]Citing *Swift & Co.*, 115 NLRB 752, 753 (1956) (procurement drivers who made purchases for employers); *Firestone Tire & Rubber Co.*, 112 NLRB 571, 573 (1955) (production schedulers); *Peter Kiewit Sons' Co.*, 106 NLRB 194, 196 (1953) (lecturers who indoctrinated new employees); *Western Electric Co.*, 100 NLRB 420, 423 (1952) (personnel investigators who made hiring recommendations); *American Locomotive Co.*, 92 NLRB 115, 116-117 (1950) (buyers who made substantial purchases on employer's behalf).

Mr. Justice White in *Bell Aerospace, supra*, at 304, 306, agreed that "The House Managers' statement accompanying the Conference Committee Report explains that the Act was not amended expressly to exclude labor relations and confidential employees from coverage under the Act, because it was already prevailing Board practice to exclude these employees" and that Congress "expressed a desire to exclude only labor relations *and* confidential employees whom it thought the Board had previously held outside the Act. . . ." Nevertheless, the Board continues to contend that the labor policy limitation should be applied to "those explicitly mentioned by Congress, which 'regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary'" even though the Supreme Court has not so limited even the managerial employee exclusion.

The judiciary had come a full circle from Chief Justice Burger's decision recognizing the Board's exclusion from the Act of two categories of "managerial employees" in *Retail Clerks International v. NLRB*, 366 F.2d 642, 645 (1966), *cert. denied*, 386 U.S. 1017; to this Court's decision in *Bell Aerospace*, that the "conflicts of interest in labor relations" limitation was not applicable to the second category: those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." The other "strand of the managerial employee" were those "so clearly related to or aligned with management as to place the employee in a position of potential conflict of interest between his employer on the one hand and his fellow workers on the other" and who do not supervise other workers, do not necessarily possess confidential information about other workers, and at times "even where a conflict of interest is not apparent." *Retail Clerks, supra*. This "strand" seems extremely similar to the category intended to be excluded from the Act by Congress: "an individual who *by the nature of his duties* is given by the employer information that is of a confidential nature, and

that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer." "Most of the people who would qualify as 'confidential employees' are executives and are excluded from the Act in any event. The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these." *NLRB v. Bell Aerospace*, 416 U.S. at 283 and 284 quoting H.R. Rep. No. 245, p. 23. The judiciary recognized that Congress had intended to exclude "confidential employees" from the Act, and that this category is separate from the category of persons employed in labor relations, personnel and employment matters, and that the "confidential employee category" was not limited by a labor relations nexus. The 1947 House Report had stated that in neither the case of employees with confidential labor relations or confidential competitor relations information "should the employee's loyalty be divided" and that "the bill therefore excludes from the definition of employees, persons holding positions of trust and confidence whose duties give them secret information."

In 1979, the Seventh Circuit held that "all secretaries working in a confidential capacity, without regard to labor relations, be excluded from the Act" indicating that the personal secretary to the manager and chief executive officer of Hendricks would be a confidential secretary if "'by the nature of [her] duties' she was 'given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.'" *Hendricks County REMC v. NLRB*, 603 F.2d 25, 29 (7th Cir. 1979) citing H.R. 3020 §2(12)(C), 80th Cong., 1st Sess. (1947) and 416 U.S. at 284 N.12. (P. App. 30a & 31a)

D. The Logical Application of the Confidential Employee Exclusion

The opponents to the recognition of the clear legislative intent and to the judicial resurrection of a premise once recognized but subsequently and methodically decimated by administrative explanation, foretell the Armageddon in labor management relations from the application of the true confidential exclusion. It is doubtful that the Courts of Appeals will boldly embellish the exclusion beyond the congressionally stated purposes for its existence in an effort to "strike a major blow at white-collar unionism" and to exclude "many, if not most, white-collar workers" and many blue-collar employees from the "scope of protection accorded by the Act." The progression of Board decisions in this area since 1957 makes unlikely the vivacious extension of the congressional intent by Board interpretation and application. Indeed, the logical application of the exclusion consistent with the purposes recognized and expressed by Congress merely defines the appropriate line between management and labor. See *Packard Co. v. NLRB*, 330 U.S. 485, 493 (1947), dissenting opinion of Mr. Justice Douglas.

The "confidential employee" definition adopted by the Court below in deference to the Supreme Court's pronouncement in *Bell Aerospace*, excludes only one who (1) by the nature of his [employment] duties, (2) is given by the employer, (3) information that is of a confidential nature, (4) which is not available to the public, or to competitors or to employees generally, (5) for use in the interest of the employer. To invoke the exclusion, the information must not only be confidential in nature, but also cannot be available to either the public, or to competitors or to other employees generally. This limitation of the type of confidential information conforms with Congress' concern for the "intimate details of the business that frequently are highly confidential." H.R. Rep. No. 245, at 16. This limitation is supported by several Board precedents defining the confidential nature of information, as recently discussed by the First Circuit in

Texas Instruments, Inc. v. NLRB, 637 F.2d 822 (1981) at 831.[16]

Additionally, the exclusion only applies to those who by the nature of their duties would be given such information by the employer and for use in the interest of the employer. This recognizes the congressional intent to only "exclude from the definition of employees persons holding positions of trust and confidence whose duties give them secret information" and to provide "in management and loyal to it persons not subject to influence or control by unions." As Congress believed in 1947, "Most of the people who would qualify as 'confidential' employees are executives and are excluded from the Act in any event" and the others are normally "confidential clerks and secretaries to such people as these." H.R. Rep. No. 245 at 16 & 23. Also, this definition recognizes that happenstance receipt of such confidential information does not bring exclusion, and is consistent with the judicial recognition that the Board has excluded employees "so closely related to or aligned with management as to place the employee in a position of *potential* conflict of interest between his employer on the one hand and his fellow workers on the other." *Retail Clerks International, supra*, at 644. Indeed, the Board in several cases between 1940 and 1957 excluded without regards to labor relations the private secretaries and clerks to executives, staff assistants to department managers,

[16] "A second factor to be considered is the confidential nature of the information in the wage survey report. This is not a case involving information gathered by the employees themselves; information already effectively released by the company; or information so generally known in the outside world as to be beyond protection, see *News-Texan, Inc. v. NLRB*, 422 F.2d 381, 386 (5th Cir. 1970); *Southern & Western Lumber Company, supra*, 212 NLRB at 669 [1974]; in which the information was readily accessible to employees, see *Southern & Western Lumber Company, supra*, 212 NLRB at 669; *Ridgely Manufacturing Company, supra*, 207 NLRB at 197; or in which nothing in the nature of the information suggested its confidentiality, see *Southern & Western Lumber Company, supra*, 212 NLRB at 669."

secretaries and office clerks to district office managers, secretaries to supervisors who handled grievances, timekeepers and certain other employees having "interests and functions which are more closely aligned to those of management than are the interests and functions of the ordinary employees of the Company." *Burke Brewery, Inc.*, 54 NLRB 1061, 1062 (1944). In 1973, the Board overruled the Regional Director and excluded from the unit the secretaries to the industrial relations assistant, employment supervisor, maintenance superintendent, zone foreman, production superintendent, and production managers of separate plant facilities, as confidential since the "record supports the conclusion that they assist in the preparation of, or have access to, confidential labor relations information such as the Employer's data in preparation for contract negotiations, minutes of negotiating sessions, and grievance investigation reports" and "although two of the disputed employees testified they did not open their supervisors' confidential mail and could not recall whether they had typed their supervisors' contract modification proposals or strike procedures." *Firestone Tire & Rubber Co.*, 201 NLRB 347 (1973). In fact, as recently as October 2, 1979, the Board acting through the Regional Director of Region Six pursuant to Section 3(b) of the Act, after discussing the *Hendricks'* standard, specifically excluded from the unit "executive secretaries" including, but not limited to, all secretaries to corporate officers. *G. C. Murphy Co. and United Steelworkers of America*, Case No. 6-RC-8583; Decision, at 6. (P. App. at 16 in Transcript)

The Board has cited three cases for its proposition that a conflict exists between the circuits. The most noted is *Union Oil Company of California v. NLRB*, 607 F.2d 852 (9th Cir. 1979), wherein the Court at 853 held that computer operators performed duties of a purely clerical nature and were not confidential "Because there is substantial evidence that the computer operators acted as record custodians for persons who do not formulate *or*

implement labor policy." Thus, the Ninth Circuit did not adopt the exact standard advocated by the Board, and stated that "More significant is the fact that the computer operators were under the supervision of Marquardt, who was responsible for computer operations, not labor relations." Furthermore, these computer operators might very well still be non-confidential under the *Hendrick's* standard since the actuarial statistics, wage and capital and operating expense information seems to have been readily available to numerous employees, and they did not have the close relationship to management. In *NLRB v. Allied Products Corp.*, 548 F.2d 644, 648-649 (6th Cir. 1977), the Court recognized that it had previously applied the standard for confidentials now argued by the Board, but held that the Board had erred by "incredibly" including in the bargaining unit the personal secretary to "the general manager and chief labor relations administrator of the plant," indicating its decision was "in spite of those precedents and recognizing the narrow scope of our review." More importantly, the Court reversed the inclusion of the division manager's secretary holding that "Although he is not directly responsible for the Company's relationship with the Union, and although he does not formulate, determine and effectuate company labor relations policy, nevertheless, he does formulate, determine and effectuate company-wide management policies which critically affect labor relations." Thus, the Sixth Circuit seems to have recognized the inequitable result from a strict application of the Board's confidential employee standard, which likewise occurred by its application in *Hendricks.*

In fact, the Board's extremely restrictive interpretation in the last ten years and the resulting removal from management of individuals whose loyalty is required in order for business to function, generated the thorough analysis of this area by the judiciary and the reversals of the Board's holdings. (See previous discussion of *Peerless of*

America, supra, and *Wheeling Electric, supra*). The failure of the Board to recognize the employer's right to loyal and confidential employees and to protect confidential information now seems to be pervasive. In *Texas Instruments, Inc. v. NLRB, supra*, at 829-833, the First Circuit reversed the Board's holding in *Texas Instruments, Inc.*, 247 NLRB No. 37 (1980) that the employer had committed an unfair labor practice by discharging employees who were exercising their Section 7 rights by distributing during a union organization campaign confidential company information regarding wages in violation of a valid rule prohibiting deliberate disclosure. Stating that the Board's determination was contradictory to its own precedent "that employees are entitled to use for self-organization purposes information and knowledge which comes to their attention in the normal course of work activity and association but are not entitled to the Employer's private or confidential records," the Court held that the conduct of the employees was clearly not protected activity.[17] In *Peavey Company*, 249 NLRB 853 (1980), the Board found a Section 8(a)(1) unfair labor practice when the vice president told a secretary that she was a confidential employee and could not engage in union

[17]Citing *Ridgely Manufacturing Co.*, 207 NLRB 293, 296-97 (1973); *NLRB v. Florida Steel Corp.*, 544 F.2d 896, 897 (5th Cir. 1977); *Clearwater Finishing Co.*, 203 F.2d 938 (4th Cir. 1953); and concluding: "we disagree with the Board's conclusion that TI was prohibited, as a matter of law, from enforcing its security rule with respect to conduct such as occurred here, *i.e.*, its employees' deliberate disclosure of confidential wage survey material, gathered for management purposes and marked "strictly private," that had come to the employees' attention irregularly, outside proper channels. Contrary to the Board's ruling, we do not believe the employees' conduct as described was activity protected by the NLRA. It follows that TI's rule prohibiting deliberate disclosure of confidential company information, which the Board correctly held to be valid on its face, could be validly applied on these facts to prohibit and penalize dissemination of the information in question." [*id.* at 829] Since Texas Instruments dealt exclusively with the Department of Defense, many of its documents were classified as "strictly private."

found that even contending that an employee is confidential can bring a violation determination. Such decisions certainly dramatize the need for a meaningful and clear definition of the term "confidential" employee which cannot be made meaningless by the Board's "labor relations policies" limitation and its interpretation thereof. Such a definition recognizing the line between management and labor and the right of the employer to have certain loyal employees was drafted and intended by Congress, and has been recognized by this Court in *Bell Aerospace, supra,* and by the Seventh Circuit below in *Hendricks.* The evil which Congress had feared and intended to eradicate by providing for the exclusion of this category of employee in 1947, is well demonstrated by the results of Board decisions ignoring this exclusion, including its decision in *Hendricks.*

The Board in *Hendricks* concluded that the personal secretary to "General Manager" and "top executive officer" Dillon "was not a confidential employee as the Board defines that term" in that her "' duties do not involve her in a confidential capacity with his responsibilities' with respect to labor policies." (P. App. 49a and 37a). The Board stated that "it is questionable whether Dillon falls into the category of 'persons who formulate, determine and effectuate' labor policies in the conjunctive sense tended by the Board in *B. F. Goodrich, supra,*" even though finding that he was present at all labor negotiation meetings, kept at his desk papers relating to labor contract negotiations including copies of positions developed by the REMC's negotiating committee and his notes taken during negotiations, interviewed all prospective employees, and considered labor relations problems concerning both union and non-union employees if the problems were not first resolved by the assistant manager or of the office manager. (P. App. 47a and N. 10). Secretary Weatherman herself

personally testified that Dillon was the principal operating officer of the REMC and "had general responsibility for all of the labor relations of all of the employees, Union employees as well as those in the office." (J. A. 14) Her opinion was consistent with the testimony of Assistant Manager Spencer[18] and Manager Dillon.[19] General Manager Dillon's functions regarding labor relations *matters* were obviously greater than those of either the general manager or the division manager whose personal secretaries were excluded in *Allied Products Corp., supra*, or the employment supervisor, maintenance superintendent, foreman, and plant production managers whose secretaries were excluded in *Firestone Tire, supra*, for mere access to labor matters. Similar to the facts in *Peerless, supra*, secretary Weatherman's desk was in the same room with Manager Dillon's desk separated only by a six foot high partition. As her regular employment duties, she opened mail to Hendricks and Dillon except for correspondence from Hendricks' lawyers to the Union, kept and processed all insurance claims for employees, typed Manager Dillon's letters and notices as to the dates of labor negotiation meetings and typed minutes of the meetings of the REMC's Board of Directors, including minutes containing references to personnel matters and Hadley's request for reinstatement which generated the

[18]Q. Who was the one that determined management policy concerning interpretations of the Labor Contract with the IBEW?
A. Basically it could come through me first with the approval of Wally Dillon. I would have to say that Wally was.
Q. Who would make the final decision?
A. Wally Dillon.
Q. Who carried out and effectuated these management policies?
A. Wally Dillon or if he would ask me to then I would do so. (J. A. 20)

[19]Dillon testified that he interviewed prospective employees, fired employees along with his staff, fulfilled the labor relations policies formulated by the Board of Directors and resolved labor relations problems not "ir[illegible] out" by staff. (J. A. 23 & 24)

protest to the Directors by her and other employees.[20] (P. App. 45a and 46a) Although not having confidential duties "with respect to labor policies," this secretary did have duties regarding personnel matters, and had access to and even obtained information regarding labor relations matters in her capacity to the individual having the ultimate responsibility to fulfill the labor policies. Nevertheless, the strict application by the Board of its definition of confidential employee limited to labor policy deprives chief executive officers and chief operating officers of loyal executive secretaries.[21] For example, in *NLRB v. Los Angeles New Hospital*, 640 F.2d 1017, 1023 (1981), the Ninth Circuit affirmed the Board's reversal of the ALJ's decision which had held that the secretary to the assistant hospital administrator in charge of fiscal affairs was a confidential employee and had no rights under the Act since she had access to confidential data and even typed "memoranda to the Hospital's personnel director regarding wage raises and evaluations by department heads of certain employees; a memo to an employee's file regarding his termination; and other internal management memoranda regarding payroll and other matters."

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[20]Secretary Weatherman testified that in March, 1977, she and her husband had gone to the home of REMC Director Lydick, the chairman of the committee investigating Lloyd Hadley's request for reemployment, on Hadley's behalf. Although first testifying that she did not know Lydick was the chairman until the night of her meeting or of the committee until typing the March, 1977, Board Minutes, she then admitted typing the February 8, 1977, minutes containing the committee information. (J. A. 9, 13, 14 & 15, Tr. Vol. II, 6) She also agreed that she worked in connection with Manager Dillon in processing medical and disability insurance forms and making sure that the employees received the proper insurance benefits, including the disability statement from Lloyd Hadley's physician. (J. A. 6 & 14).

[21]The record is void of evidence regarding this secretary's duties and access to other confidential information of the employer since, as noted by the Court below, the Administrative Law Judge restricted the record to personnel files and the Board upon remand failed to reopen the proceedings for additional evidence but merely made the "gratuitous conclusion that the Company 'is a cooperative, and that all members *presumably* have access to [its] documents'" based upon Manager Dillion's statement that the Company had "nothing to hide from the *members*." (P. App. 7a & 8a).

The Board has even inconsistently applied its own definition of "confidential employee" by more strictly interpreting the "labor relations policy" limitation in discharge and other unfair labor practice cases, than it does in determining bargaining units. In *Los Angeles New Hospital, supra, North Arkansas Electric Cooperative, supra,* and *Hendricks County REMC, supra,* the Board determined that the individuals were not confidential, while in *Burke Brewery, supra, W. K. B. H., Inc., supra, Firestone Tire & Rubber Co., supra,* and *G. C. Murphy Co., supra,* it excluded the same type of individuals from bargaining units. The Eighth Circuit noted in *NLRB v. North Arkansas Electric Cooperative,* 412 F.2d 324, 326 at N.4 (1969) that "The cases involving the exclusion of non-supervisory employees from a bargaining unit as 'managerial employees' are legion" citing several cases including *Bendix Aviation Corp., supra,* and *Rural Electric Co., Inc.,* 130 NLRB No. 799 (1961) wherein the Board had excluded the electrification advisor from the unit, even though it now was including the North Arkansas Coop electrification advisor under the Act in this discharge case. Discussing this inconsistency in its second decision, *NLRB v. North Arkansas Electric Cooperative,* 446 F.2d 602, 609-610 (1971), the court held:

> In the Board's second decision in this case, it concedes that there has been a lack of clear definition of the "managerial employee" category which it has created.[4] It indicates that an employee may not have the requisite community of interest with other employees to be included with them in a proposed unit, but still be an employee entitled to the protection of the Act as a section 2(3) "employee." We find nothing in the Act or its legislative history to indicate Congress intended the word "employee" to have one definition for the purpose of determining a proper bargaining unit and another definition for the purpose of determining which employees are protected from being fired for union activity. (Citing *NLRB v. Wheeling Electric Co., supra*)

Secretary Weatherman was not a member of the bargaining unit existing at Hendricks (P. App. 38a N.2) and "Nothing therein contained [Act] can be interpreted as evidence of a purpose to protect employees who are not members of any bargaining unit and who are more closely aligned with management than they are with the members of the bargaining unit." *id.* at 608.

II.

THE COURT IMPROPERLY APPLIED THE EXCLUSION FROM THE NATIONAL LABOR RELATIONS ACT OF PERSONS WORKING IN LABOR RELATIONS, PERSONNEL AND EMPLOYMENT DEPARTMENTS, BY CONCLUDING THAT THE BOARD HAD FOUND THAT THE PERSONAL SECRETARY TO THE CHIEF EXECUTIVE OFFICER WAS NOT A PERSONNEL DEPARTMENT EMPLOYEE

The Circuit Court below concluded that "The ALJ also found that Weatherman was not working in a position equivalent to a personnel department employee, a finding which we do not consider clearly erroneous." (P. App. 27a) However, the Decision of the Board made no such finding, and in fact, specifically notes only that the Company "advances two legal defenses to the claimed violation here" stating that "The first is that Weatherman was confidential employee and therefore not protected by the Act" and that "Respondent's final contention is that Weatherman's signing of the petition did not constitute Section 7 activity because the petition concerned the plight of a former employee." (P. App. 44a & 49a) Perhaps the Circuit Court's belief that the Board had ruled upon the other exclusionary rule argued by the Company is because the Board has comingled the exclusions in prior decisions.

Prior to and long after the passage of the Taft-Hartley Act in 1947, the Board itself consistently recognized the Congress' intended subsection (B) exclusion for individuals "employed in labor relations, personnel, employment... matters." As noted previously, the Second Circuit

concluded "It is quite clear—and the Board does not challenge this—that Congress believed 'persons working in the labor relations, personnel and employment departments' would be excluded." *Bell Aerospace v. NLRB*, 475 F.2d 485, 491 (1973). See also *Wheeling Electric, supra*, at 786 and *North Arkansas Electric Cooperative, supra*, at 607. Indeed, the Board did until the mid 1960s include individuals employed in personnel or employment matters.[22] The Board's desire to terminate both exclusions by the co-mingling of these two separate exclusionary categories is well demonstrated by its argument at page 44 of its Brief[23] and by its argument at N.54 that Weatherman,

---

[22] *Montgomery Ward & Co.*, 36 NLRB 69, 72 & 73 (1941); *Youngstown Sheet Tube Co.*, 56 NLRB 559, 561 & 562 (1944); *Aluminum Company of America*, 61 NLRB 1066, 1073 (1945) ("all employees of personnel departments or employees otherwise engaged in personnel work"); *B. F. Goodrich Co.*, 115 NLRB 722, 725 (1956) (secretaries to personnel manager and office manager). However, in 1966, the Board placed the labor relations policy limitation upon the exclusion of persons employed in labor relations, personnel and employment matters by holding that secretaries and clerks who kept time and work records and typed memoranda dealing with personnel matters were not "sufficiently concerned with labor relations matters to be considered confidential employees". *Hotel Employers Association*, 159 NLRB 143 at 150 (1966). See also *John Sexton & Co.*, 224 NLRB 1341 (1976). These latter cases were in disregard of the Board's established policy to exclude employees with any function regarding personnel or employment matters even if not working exclusively in a personnel department. *American Smelting & Refining Co.*, 61 NLRB 506, 509 (1945) (exclusion of manager's secretary with "access to personnel files"); *Western Union Telegraph Co.*, 38 NLRB 492, 499 (1942) (exclusion of authorization clerk having custody of service records cards of all employees).

[23] "Although the ALJ, whose decision was adopted by the Board, did not discuss Weatherman's status as a "personnel department employee" separately from her status as a "confidential employee" with a "labor nexus," the relevant portion of the ALJ's decision (Pet. App. 44a-49a) clearly shows that, in finding that Weatherman did not have any access to confidential labor-related information, he also found that her duties with respect to personnel matters (such as they were) were insufficient to affect her status as an employee entitled to the full protection of the Act."

even as a personnel employee, must have access to labor relations information of a strategic or otherwise sensitive nature that could compromise her employer's dealings with the union, to be excluded. Obviously, this is the same definition which the Board espouses for the "confidential employee" exclusion.

The Board's policy prior to and for nearly 20 years after Taft-Hartley was to exclude any employees working in a personnel or employment department or with *access* to personnel information since these employees "necessarily are conversant with information concerning labor relations." *Babcock & Wilcox Company*, 52 NLRB 900, 903 (1943). Having only 35 employees, Hendricks did not have a separate personnel director or personnel department. Nevertheless, small businesses should be accorded the same rights regarding this exclusion as America's massive corporations such as B. F. Goodrich Company and Allied Products Corporation. Secretary Weatherman shared the same room with the chief executive officer who had the ultimate authority to hire, discipline and terminate employees and administered their employment benefits. Although the Supreme Court should ordinarily acquiescence in the conclusion of fact made by a lower court, the Court will review the conclusion if it is not supported by the evidence in the record and constitutes a glaring error. *Harkin v. Brundage*, 276 U.S. 36 (1928); *Besser Manufacturing Co. v. United States*, 343 U.S. 444 (1952).

CONCLUSION

The judgments of the Court of Appeals should be affirmed insofar as the enforcement of the Board's orders were denied and regarding the Court's definition of the "confidential employee" exclusion, but should be reversed insofar as the Court's conclusion that the Board determined Weatherman not to be working in a position equivalent to a personnel department employee.

Respectfully submitted,

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No. 30-885

In the Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

MALLEABLE IRON RANGE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR MALLEABLE IRON RANGE COMPANY

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QUESTION PRESENTED FOR REVIEW

Malleable Iron Range Company, hereinafter referred to as "MIRCo", does not agree with the question as presented by the National Labor Relations Board, hereinafter referred to as "Board"; therefore the following question is presented:

> "Whether the Court of Appeals for the Seventh Circuit erred by finding that the Board did not apply the proper legal standard of *NLRB* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267 (1974), relating to a determination of eligibility of employees in a collective bargaining unit; namely, that all confidential employees, and not only those in labor relations, are excluded from the protection of the National Labor Relations Act".

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---

BRIEF FOR MALLEABLE IRON RANGE COMPANY

OPINIONS BELOW

MIRCo accepts the statement of the Board in this regard.

JURISDICTION

MIRCo accepts the statement of the Board in this regard.

STATUTES INVOLVED

MIRCo accepts the statement of the Board in this regard.

STATEMENT OF THE CASE

MIRCo accepts the Board's "STATEMENT", in "B. Malleable" (Bd. Brief 9-13), with the additions as stated herein.

The Board correctly notes that MIRCo's confidential employee ineligibility contention related to eighteen (18) employees. However, the Court of Appeals below did not address several other issues raised by Respondent; namely, (1) Whether thirteen (13) of the 18 and four (4) other employees should be managerial exclusions from the bargaining unit?; (2) Whether four (4) of the eighteen (18) and another employee should be supervisory exclusions from the bargaining unit?; and, (3) Whether improper legal standards were applied by the Board in determining that time study personnel, research-development engineers and plant clerical employees comprise an appropriate collective bargaining unit together with the office clerical employees?

SUMMARY OF ARGUMENT

The Board's argument that the Labor Management Relations Act, 29 U.S.C. §151 *et seq.*, hereinafter "Act" permits application of the "labor nexus" test for determining the confidential capacity of employees is without merit.

This Court decided in *NLRB* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267, 85 LRRM 2945

(1974) that the early Board decisions which pre-dated the 1974 amendments to the Act, the legislative history of the Act and subsequent Board and court decisions require the conclusion that Congress intended to impliedly exclude from the protection of the Act employees properly classified as confidential.

This Court in *Bell Aerospace* did not misconstrue, as the Board argues, the legislative history of the Act or *Ford Motor Co.*, 66 NLRB 1317, 17 LRRM 394 (1946) in connection therewith.

Nor do subsequent court of appeal decisions require a revival of the "labor nexus" test for confidential employee determinations.

The judgment of the United States Court of Appeals for the Seventh Circuit in the proceeding below to exclude confidential employees from the protection of the Act without application of the Board's "labor nexus" test is correct and should be enforced.

The appropriate test for determining the confidential exclusionary questions in this Case on remand to the Board will remove from the properly classified confidential employee the onus of deciding which and to what degree loyalties should be compromised as between management and fellow employees.

ARGUMENT

I.

THE BOARD'S "LABOR NEXUS" TEST IS NOT THE PROPER LEGAL STANDARD FOR DETERMINING THE CONFIDENTIAL STATUS OF EMPLOYEES

The cases[1] before the Court in this cause involve the question of whether the Seventh Circuit Court correctly concluded that "all confidential employees, and not only those in labor relations, were excluded from the protection of the Act"; i.e., the Board's limiting "labor nexus" relationship test is not the proper legal standard for determining confidential employees. (Pet. App. 3a, 58a).

The authority for the Seventh Circuit's conclusion is *NLRB* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267, 85 LRRM 2945 (1974). (Pet. App. 32-4a, 27a-31a, 57a-58a.

The Board advances a number of reasons to support the proposition that the *Bell Aerospace* holding does not require the "rejection of the Board's 'labor nexus' test for determining the status under the Act of confidential nonmanagerial personnel". (Bd. Brief 32-39).

MIRCo disagrees.

The Board contends that *Bell Aerospace* incorrectly interpreted the legislative history of the Act. On the subject, this Court stated as follows:

> "The legislative history of the Taft-Hartley Act of 1947 may be summarized as follows. The House wanted

[1] The *Hendricks County Rural Electric Membership Corporation* companion case is hereinafter referred to as *"Hendricks"*.

to include certain persons within the definition of 'supervisors' such as straw-bosses, whom the Senate believed should be protected by the Act. As to these persons, the Senate's view prevailed. There were other persons, however, whom both the House and the Senate believed were plainly outside the Act. The House wanted to make the exclusion of these persons explicit. In the conference agreement, representatives from both the House and the Senate agreed that a specific provision was unnecessary since the Board had long regarded such persons as outside the Act. Among those mentioned as impliedly excluded were persons working in 'labor relations, personnel and employment departments,' and 'confidential employees.' But assuredly this did not exhaust the universe of such excluded persons. The legislative history strongly suggests that there also were other employees, much higher in the managerial structure, who were likewise regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary. For example, in its discussion of confidential employees, the House Report noted that "[m]ost of the people who would qualify as 'confidential employees' are *executives and are excluded from the Act in any event.*' H.R. Rep. No. 245, p. 23 (emphasis added.)[12]

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[12] The Report stated in reference to "confidential employees": "These are people who receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally. *Most of the people who would qualify as 'confidential employes' are executives and are excluded from the act in any event.*

"The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to people such as these." *Ibid.* (Emphasis added.)

In 1946 in *Ford Motor Co.*, 66 NLRB 1317, 1322, the Board had narrowed its definition of "confidential employees" to embrace only those who exercised "managerial" functions in the field of labor relations". The discussion of "confidential employees" in both the House and Confer-

> ence reports, however, unmistakably refers to that term as defined in the House Bill, which was not limited just to those in "labor relations". Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.

> We think that the inference is plain that 'managerial employees' were paramount among this impliedly excluded group." [*Bell Aerospace, supra* at 283-284, 85 LRRM 2951].

This analysis, particularly that set forth in footnote 12, was fundamental to the conclusion by the Seventh Circuit that the Board's "labor nexus" test may not appropriately be applied to the questions of whether confidential employees are protected employees undr the Act. (Pet. App. 3a-6a, 27a-31a, 57a-58a).[2]

In view of this Court's clear and explicit interpretation given to the legislative history of the 1947 amendments to

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[2] At least two legal treatises on this exact point support the lower Court's conclusion. Thus, in one of them, the following was stated:

> "The Court examined the legislative history of the 1947 Amendments and held that Congress intended to exclude *all* managerial employees 'from the protections of the Act'. *To reach this holding, the Court also concluded that confidential employees were excluded from the coverage of the Act*". [Keller, Brooks, *NLRB Treatment of Confidential Employees' Renewed Confrontation with Congress and Courts,* 31 Lab. L.J. 733, 738-739 (1980); emphasis supplied].

Also, in a footnote to the conclusion of the Note, *Will The Real Managerial Employees Please Stand Up?,* 9 Loy. L.A.L. Rev. 92 (1975), the following was stated:

> "A final result of the Supreme Court decision (*Bell Aerospace*) which seems clear is that confidential employees are likewise excluded from the protection of the Act. The legislative analysis applied to managerial employees will apply *a fortiori* to confidential employees". [*Ibid.,* 123, n. 180].

the Act, the only way the Board in this cause could regain the "labor nexus" policy for confidential exclusions is for this Court to reverse the recent *Bell Aerospace* analysis of the legislative history.[3]

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[3] Insofar as the Court may engage in another review of the legislative history, MIRCo adopts the able presentation thereof by Counsel for Hendricks in its Reply Brief as supplemented in this footnote. The National Industrial Recovery Act, as part of the Great Depression legislation, was the precursor of the original Act. In this regard, an article entitled "US Government Spinning Out of Control", published in the *Milwaukee Journal*, Sunday, June 14, 1981, Sunday Forum edition, stated as follows:

> "The chief proponents of a strong central government then were business leaders, and they wanted it only strong enough to protect commerce. The poor were thought to be poor because of personal failure. Help for the needy came mostly from family, charity or local government.
>
> But in 1929 the wheels fell off. Suddenly 12 million Americans, one out of four of the country's breadwinners, were looking for jobs that didn't exist. More than 86,000 businesses went under.
>
> In the spreading hunger and deepening humiliation, middle-class neighbors knocked on back doors for handouts. Rioting farmers dumped cans of milk rather than sell it for two cents a quart.
>
> State and city governments were virtually helpless. Private charities dried up. The whole country seemed at a dead stop.
>
> Only the federal government had the resources to help, and under Franklin Roosevelt it did: Federal Emergency Relief. Social Security. Unemployment Compensation. The Civilian Conservation Corps. The National Labor Relations Act. The Securities and Exchange Commission. The Agricultural Adjustment Administration. The Tennessee Valley Authority. The Works Progress Administration". (*Ibid.*, p. 1).

The Board's first year of existence was by authority of Public Resolution No. 44, which was enacted by the 73rd Congress due to the failure of that Congress to enact a comprehensive federal labor law.

(footnote continued)

The Board also argues in its attempt to revive the "labor nexus" test that *Bell Aerospace* misconstrued the decision in *Ford Motor Co.*, 66 NLRB 1317, 17 LRRM 394 (1946), because the Board has consistently applied the "labor nexus" test "to non-managerial confidential employees since the early days of the Wagner Act". (Bd. Brief 33, 35). To the contrary, consider the following remarks from the law review Comment, *Will The Real Managerial Employees Please Stand Up?*:[4]

(footnote continued)
I. *Leg. Hist.* 1255 B. In the 1st Session of the 74th Congress in 1935, S. 1958 and H.R. 6187 were the progenitors of the Act as passed by Congress in 1935. Both bills initially defined "employee" in the same language as that which became the law, and that language remained the same until the 1947 amendments. I. *Leg. Hist.* 1295; II *Leg. Hist.* 2444. As best as can be determined, the only statements and legislative debate on the subject of "employees" related to the concern that discharged and striking employees would retain employee status after the fact. I. *Leg. Hist.* 1342-46; II *Leg. Hist.* 1683, 1688, 1748, 1833-84, 2305-06, 2400 and SENATE REPORT No. 573 on S. 1958. This cursory reference to the pre-1947 legislative history supports a couple of observations. First, the "employee"-"employer" dichtomy was conceived within the context of an extremely depressed economy designed to up-grade the livelihood of the working class of the "plant", which is precisely what Justice Douglas was referring to in his dissent in *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 493, 19 LRRM 2397, 2401 (1947). Secondly, Congress' dissatisfaction with the Board's development of the scope of the "employee" definition after the initial enactment of the Act in 1935 moved Congress to amend the Act in 1947.

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[4] The author described the scope of the Comment on the *Bell Aerospace* decision as follows: "The forty-year judicial, administrative, and legislative history leading to this decision, as well as its immediate and potential ramifications upon American labor relations". (*supra*, at 92).

"Intense production in the mid-war years gave rise to a rash of organizing among foremen. This provided fertile ground for litigation of the managerial issue. In 1942, the expression 'closely related to management' became a basis for excluding time study men.[26] By 1943, the term 'managerial function' was used, but usually in conjunction with descriptions of supervisory authority and confidential relationships to management.[27] The terms confidential, managerial and supervisory were frequently used interchangeably and the concomitant confusion persists to this day.[28] The year 1944 was a banner year for 'managerial' proliferation. In January, assistant buyers who possessed no authority to hire, fire, or discipline were excluded from employee units as supervisors because their 'interests —[were] identified with management'.[29] February witnessed managerial exclusions for executives who 'deal with matters relating to labor relations and determine labor relations policy',[30] and for buyers and expediters because of the higher degree of skill and responsibility entailed in their jobs.[31] March provided a distinction between confidential employees and buyers closely allied with management.[32] In April, the Board actually used the term 'managerial' twice to exclude those who could commit the employer's credit.[33] Yet in October, the Board considered the same trait an indicator of supervisory status without mentioning the term 'managerial'.[34]

Throughout 1945 and 1946, the use of the term 'managerial' in conjunction with those of 'supervisory', 'confidential', and 'administrative' continued and the attendant connotations mushroomed.[35] Finally, in *Ford Motor Co.*[36] the Board attempted to distinguish among the terms and defined managerial employees as

> executive employees who are in a position to formulate, determine, and effectuate management policies. These employees we have considered and still deem to be 'managerial', in that they express and make operative the decisions of management.[37]

Such categories as supervisors,[38] and others,[39] were to be excluded from units of rank and file employees.

> Confidential employees were confined to the limtied classification of 'those employees who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations'.[40]'' (*Ibid.*, 95-97; footnotes omitted).

With respect to whether confidential and managerial employees were considered by the Board as protected to organize under §2(3) of the Act during the period prior to the 1947 amendments, this Comment concluded that their status "was uncertain". (*Ibid.*, 98). Such studied conclusions are greatly at odds with the Board's contention on this point.

The Board also argues that the narrow "labor nexus" exclusionary policy should apply to the determination of the confidential classification because the courts of appeals, with only the exception of the Seventh Circuit Court below, have approved the application of that policy. (Bd. Brief 31-32).

An analysis of the cases upon which this assertion is based establishes that there is no strength to it.

Thus, the decision in *Union Oil Co. of California, Inc.* v. *NLRB*, 607 F. 2d 852, 102 LRRM 2673 (CA-9, 1979) may be read to support the proposition that the Court did not rule that the "labor nexus" test was an indispensable element for determining confidential status. Thus, the Ninth Circuit Court considered, but rejected on the basis of an insufficient record, the employer's reliance on *CF & I Steel Corporation*, 196 NLRB No. 69, 80 LRRM 1063 (1972), in which case the Board excluded as confidential employees a program-tester, a librarian for the computer tapes and a secretary on the basis that the employees regularly worked with systems considered confidential by management, the implementation of which would affect other employees. As such, *Union Oil* does not conflict with *Bell*

Aerospace. The decision in *NLRB* v. *Los Angeles New Hospital,* 640 F. 2d 1017, 106 LRRM 2855 (CA-9, 1981), may also be read in accord with *Bell Aerospace.* At issue in *Los Angeles New Hospital* was an allegation that the employer unlawfully interrogated an employee, which issue depended on the question of whether that employee had a confidential capacity. The Ninth Circuit enforced the Board's conclusion that the individual was not a confidential employee. In doing so, the Ninth Circuit noted that it was unnecessary to "reach the labor nexus question * * *". (640 F. 2d at 1023, 106 LRRM at 2859). Moreover, insofar as *Union Oil* relies on *Westinghouse Electric Corporation* v. *NLRB,* 398 F. 2d 669, 68 LRRM 2849 (CA-6, 1968), the Ninth Circuit decision is misplaced. The *Westinghouse Electric* case predates *Bell Aerospace* and was litigated within the framework of the Board's "labor nexus" exclusionary policy, which *Bell Aerospace* rejected.[5] The same applies to *NLRB* v. *Allied Products Corporation,* 548 F. 2d 644, 94 LRRM 2433 (CA-6, 1977). The Board's reliance on *NLRB* v. *Hoerner-Waldorf Corporation,* 548 F. 2d 644, 90 LRRM 3118 (CA-8, 1975), is misplaced, since the Eighth Circuit Court disposed of the case on a supervisory issue and only summarily dealt with an issue relating to the confidential status of two employees. Likewise, *NLRB* v. *California Inspection Rating Bureau,* 591 F. 2d 56, 100 LRRM 2938 (CA-9, 1979) dealt with only the jurisdictional issue relating to a political subdivision of the State and, therefore, has nothing to do with court of appeal approval

[5] Thus, the Sixth Circuit Court stated that the sole issue was whether the department managers for whom the three secretaries in question worked, whom the employer claimed as confidential, "formulated, determined, or effectuated management policies in the field of labor relations". (398 F. 2d at 671, 68 LRRM at 2851). The Court deferred to the Board's judgment that the department managers did not possess such authority; therefore, the secretaries were not confidential.

of the "labor nexus" test. Lastly, both *NLRB* v. *Service Technology Corporation*, 480 F. 2d 923, 83 LRRM 2701 (CA-5, 1973) and *NLRB* v. *Quaker City Life Insurance Co.*, 319 F. 2d 690, 53 LRRM 2519 (CA-4, 1963) predate *Bell Aerospace*, and, therefore, contribute nothing to the Board's argument.

In its entirety, therefore, the Board's attempt to regain its narrow "labor nexus" exclusionary policy must fail.[6]

II.

THE PROPER LEGAL STANDARD FOR DETERMINING CONFIDENTIAL STATUS

The Court below, in an unpublished Order, concluded that the review of the Board's decision relating to MIRCo's claim that "at least 18 of its employees should be excluded from the unit because they have access to confidential information and are therefore confidential"[7] was "frustrated by the failure of the Board to adhere to the law", as the lower Court had interpreted it in *Hendricks;* therefore, the proceedings were ordered remanded to the Board "for further consideration consistent with this order and with the *Hendricks* case". (Jt. App. 56a-61a).

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[6] Consider, in this regard, that the Board had no difficulty in excluding estimating department employees from participation in a representation election because of their confidential status, notwithstanding that the employees did not possess a "confidential work relationship with a specifically identifiable managerial employee responsible for labor policy". *Pullman Standard Division of Pullman Incorporated*, 214 NLRB 762, 763, 87 LRRM 1370, 1371 (1974).

[7] It is noted again that MIRCo also contends that 13 of these 18 employees are also managerial exclusions and that 4 of them, in addition to another employer, are also supervisory exclusions. These and additional bargaining unit issues were not considered and/or determined by the court of appeals below. (See, *supra*, p. 2; Bd. Brief 40 n. 47).

MIRCo maintains that the judgment of the Seventh Circuit is correct and should be enforced.

The appropriate test to be applied on remand is whether the employee is in possession of the type of business information which aligns the employee with management, because it is of a highly confidential nature that is not available to either the public, or to competitors, or to other employees, so that the employee must be excluded protection of the Act to avoid the potential conflict of interest between management and fellow employees.

This test is consistent with the legislative history of the 1947 amendments to the Act [8] and *Bell Aerospace*.[9]

It does no more than to allow management the undivided loyalty of employees having such a sensitive position and thereby eliminates potential impairment of its business. In this way, the test strikes an equitable balance, required by law, between the right of management to manage with a management team unencumbered by a potential break-down in loyalties and the right of the so-called white-collared employees to unionize for collective bargaining purposes with that management. In accomplishing this, and this is significant, it removes from that confidential empolyee, who would otherwise be in a collective bargaining unit by operation of the "labor nexus" test,

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[8] See, House Report No. 245 on H.R. 3020, 80th Cong. 1st Sess. (1947), at 16. (I *Leg. Hist.* of the NLRA at 307).

[9] See, in this regard, the "allied with management" standard emphasized by the Board in *Swift & Co.*, 115 NLRB 752, 37 LRRM 1391 (1956) and the citation therein of 93 Cong. Rec. 6442 (1947) as authority, which related to the "occupational groups" that the Senate did not include in the definition of supervisor and which became the language on the subject in H.R. Conf. Rep. No. 510. The alignment factor is substantially different than the narrower "labor nexus" test, because a work relationship to a managerial employee in labor relations is not required.

the onus of determining which and to what degree loyalties should be compromised and places that determination where it should be—the administration and implementation of the federal labor law.

Application of the test to the individuals in issue in this Case measures each as a confidential employee.[10]

An important consideration to this contention is the fact that MIRCo is engaged in an extremely competitive business. (Jt. App. 34, 40, 67). As a result, customer/distributor lists, costs and pricing data are sensitive and highly confidential business information. (Jt. App. 34, 38-40). Similarly, product design and development information is

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[10] Thus, the technical service employees, namely Kaiser, Heidmann, Murphy, Nagarka, Herbst, Lehmann and Kostolni, have access to confidential information in the form of manufacturing costs and product development. (Jt. App. 36, 37, 52). The secretary to the Industrial Sales Manager, Oelke, has access to and works with cost information that relates to the extremely competitive jobbing business. (Jt. App. 34, 66-67). Pfingsten, the inside salesman, has access to and works with customers lists. (Jt. App. 38, 57-58). The assistant service managers for the Distribution-Traffic-Product Service Department, namely, Kuzniewicz, Holloway and Schmitt, have access to financial information relating to shipments, and, with the exception of Holloway, have access to and work with the confidential distributor/dealership lists. (Jt. App. 58-59). The assistant manager in the Cost Department, Soldner, has extensive work responsibilities with financial data, such as costs, prices, percentage mark-up, sales, and profits, which is highly confidential. (Jt. App. 49-51). The assistant manager in the Computer Service Department, Wendlandt, and a computer operator, Anderson, have access to and work with confidential financial and production reports. (Jt. App. 42, 45-49, 69-70). The assistant manager in the Credit Department, Krause, has access to and responsibly works with the confidential accounts receivables. (Jt. App. 61, 73-74). Schwantes, the assistant bookkeeper, responsibly works with the confidential accounts payables and other financial records relating to cash receipts. (Jt. App. 59, 74).

highly confidential. (Jt. App. 33, 36-37). Also significant to the application of this test is the fact that MIRCo's managerial hierarchy, or "management team", is not extensive; therefore, corporate reliance on individuals, who possess and responsibly work with highly confidential business information, is more diffused. (Jt. App. 37, 75-80).

Notwithstanding, it is anticipated that this Court will not review, analyze and determine the substantive merits of the confidential status issue as to each employee, but, instead, will remand the case for further proceedings consistent with the Court's decision on the legal issue involving the interpretation of the Act.

CONCLUSION

For the reasons hereinbefore stated, MIRCo requests that the decision of the Court of Appeals for the Seventh Circuit be affirmed by this Court.

However, should the Court disagree with the decision of the Seventh Circuit, this Court should not direct enforcement of the Board's order or remand to the Court of Appeals for enforcement, as is requested by the Board, because there are undecided issues raised by MIRCo that must yet be decided by the Court of Appeals below.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

and

MALLEABLE IRON RANGE COMPANY

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-885

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

and

MALLEABLE IRON RANGE COMPANY

No. 80-1103

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

1. The Board's practice in 1947 was to treat nonmanagerial "confidential employees" as protected by the National Labor Relations Act, but to exclude from bargaining units of other employees those confidential employees (such as confidential secretaries to labor relations management personnel) with access to labor relations information that might prejudice the employer's position in dealing with the union if

disclosed prematurely (see NLRB Br. 17-24).[1] However, respondents contend (Hendricks Br. 8-15; Malleable Br. 4-7) that the 1947 Congress rejected this "labor nexus" test in favor of a test that would exclude from the protection of the Act all employees who receive from their employers *any* information that is confidential and not available to the public, to competitors, or to employees generally. The most striking deficiency of respondents' argument, as we

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[1] Hendricks relies (Br. 16, 37-38) on three Board decisions to support its argument that the Board determined confidential status "without regards to labor relations" before 1947. In *E.P. Dutton & Co.*, 33 N.L.R.B. 761, 766-767 & n.8 (1941), however, the Board explicitly relied on "labor nexus" grounds in excluding from a bargaining unit secretaries to management officials, and quoted at length from the Board's seminal "labor nexus" decision, *Brooklyn Daily Eagle*, 13 N.L.R.B. 974 (1939). In *Montgomery Ward & Co.*, 36 N.L.R.B. 69, 73 & n.6 (1941) (excluding secretaries to store managers), the Board merely followed its decision in *E.P. Dutton & Co.* Similarly, in *Burke Brewery, Inc.*, 54 N.L.R.B. 1061, 1062 (1944), the Board excluded an individual who served as "office manager, head bookkeeper, and secretary to the company president, to whom he [wa]s also related by marriage"—*not* because of his access to confidential business information, but because of his unique status, interests, and functions, which set him apart from the rank-and-file employees included in the unit. Moreover, in *Hudson Motor Car Co.*, 55 N.L.R.B. 509 (1944), and *Barrett Div., Allied Chem. & Dye Corp.*, 65 N.L.R.B. 903 (1946), two cases cited by the Court in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 276 (1974), the Board clearly applied the "labor nexus" test. In *Hudson Motor Car Co., supra*, 55 N.L.R.B. at 511, the Board stated: "Although it appears that the work of the employees * * * has its confidential aspects, it is not concerned with labor relations. The possession of information which the Company regards as secret, however, is not of itself sufficient to justify depriving these employees of the right to collective bargaining." Accord, *Barrett Div., supra*, 65 N.L.R.B. at 905-908.

have shown previously (NLRB Br. 24-29, 34-37), is that it relies not on any statutory provision that Congress enacted in 1947, but on a provision that was proposed and rejected at that time. See also AFL-CIO Br. 13-23, 25-29. Indeed, the legislative history of the 1947 amendments clearly demonstrates that Congress explicitly decided *not* to legislate concerning confidential employees, but to leave standing the Board's practice with respect to such persons.[2]

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[2] On June 5, 1947, Senator Taft explained to the Senate the action taken by the conferees, and he submitted a written summary, which stated in relevant part (93 Cong. Rec. 6442 (1947); II NLRB, *Legislative History of the Labor Management Relations Act, 1947* ("*Leg. Hist.*") 1537 (1948) (emphasis added)):

> (8) Supervisors: Both the House bill and the Senate amendment excluded supervisors from the individuals deemed to be employees for the purposes of the act. There was a sharp divergence between the House and Senate, however, with respect to the occupational groups which fell within this definition. *The Senate amendment, which the conference ultimately adopted, is limited to bona fide supervisors. The House had included numerous other classes.* The[se] were generally (A) certain personnel who fix the amount of wages earned by other employees, such as inspectors, checkers, weightmasters, and time-study personnel, (B) labor relations personnel, police, and claims personnel, and (C) confidential employees. *The Senate amendment confined the definition of supervisor to individuals generally regarded as foremen and employees of like or higher rank.*

After submitting this written summary, Senator Taft stated on the Senate floor (93 Cong. Rec. 6445 (1947); II *Legis. Hist.* 1544 (emphasis added)):

> We accepted a provision regarding plant guards. We had exempted foremen in the Senate bill, but we had not exempted plant guards. The House bill exempted plant guards, and also time-study employees and personnel forces. *We did not accept any of those provisions,* ex-

Respondents' reliance (Hendricks Br. 31-33; Malleable Br. 4-7) on this Court's decision in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), is likewise misplaced. It is true that the Court there observed (416 U.S. at 283-284 n.12) that the 1947 Conference Committee Report (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947)) indicates that Congress understood the contemporaneous Board practice to require a categorical exclusion of "confidential employees," comparable to the exclusion contained in the House bill that was not enacted. However, as we pointed out in our opening brief (Br. 33-37), this observation was not essential to the Court's holding in *Bell Aerospace*, and it involves an issue that was not there fully explored by the parties because they had no need to do so. See *Lehman* v. *Nakshian*, No. 80-242 (June 26, 1981), slip op. 9 n.13; *McDaniel* v. *Sanchez*, No. 80-180 (June 1, 1981), slip op. 10-11; *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, No. 79-1944 (May 18, 1981), slip op. 5 n.3. Moreover, we believe that the Court's observation does not truly reflect the meaning of the Conference Report, which

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cept that as to plant guards we provided that they could have the protection of the Wagner Act only if they had a union separate and apart from the union of the general employees.

Respondents' argument would obviously have great force if the 1947 Congress had accepted the definition of "supervisor" contained in the House bill (H.R. 3020, 80th Cong., 1st Sess. § 2(12)(C) (1947)). However, the House definition did not prevail, and Congress declined to overrule the Board's practice concerning "confidentials" when it declined to amend the statutory definition of "employee" (see Section 2(3) of the Act, 29 U.S.C. 152(3)) to exclude "confidential employees." It is certainly a novel principle of statutory construction that the meaning of a statute is to be found in a provision that Congress could have enacted, but specifically rejected.

states in relevant part (H.R. Conf. Rep. No. 510, *supra*, at 35):

> In the case of persons working in the labor relations, personnel[,] and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated and presumably will continue to treat, such persons as outside the scope of the [A]ct. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. * * *

When read in the context of what the Conference Committee actually did, this statement shows only that Congress intended to continue "the prevailing Board practice" with respect to "confidential secretaries" and "persons working in the labor relations, personnel[,] and employment departments." It does not suggest that Congress intended to exclude from the Act the broad class of persons included in the House bill's definition of "confidential employees" (see pages 3-4, note 2, *supra*). And, as we shall show (see also page 2, note 1, *supra*; NLRB Br. 17-24), "the prevailing Board practice" with respect to the persons described in the Conference Report was merely to exclude them from bargaining units with other employees when they had access to labor relations information which (if prematurely disclosed) might prejudice an employer in dealing with the union.[3]

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[3] Indeed, it was precisely because Congress correctly understood the Board's prevailing practice with respect to confidential employees that the House initially thought it necessary to enact the more expansive exclusion that was rejected in Conference. Thus, the House Report stated (H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947) (emphasis added)):

Finally, the broad exclusionary rule urged by respondents is inconsistent with the fundamental statutory policy because it would delegate to employers the power to determine unilaterally whether employees are entitled to the protection of the Act. In this practical sense, this case is far different from *Bell Aerospace*, which involved "managerial" employees who had "abandoned the 'collective security' of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such 'security' " (416 U.S. at 281 n.11, quoting H.R. Rep. No. 245, 80th Cong., 1st Sess. 16-17 (1947)). Under respondents' broad rule, however, employees would become "confidential employees," not by their own choice, but by the choice and for the convenience of their employer. See NLRB Br. 33-34, 37-39. If the Act excluded every employee who receives information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, an employer could unilaterally deprive countless employees of the protection of the Act simply by choosing to share with them some part of his "endless" store of "confidential" information (Pet. App. 12a; Cudahy, J., dissenting). Thus, in rejecting the House bill's

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Most of the people who would qualify as "confidential" employees [under the House bill] are executives and are excluded from the act in any event.

The Board, itself, normally *excludes from bargaining units* confidential clerks and secretaries to such people as these. But protecting confidential financial information from competitors and speculators, protecting secret processes and experiments from competitors, and protecting other vital secrets ought not to rest in the administrative discretion of the Board or on the responsibility of whatever union happens to represent the employees. The bill therefore *excludes from the definition of employees* persons holding positions of trust and confidence whose duties give them secret information.

broad exclusion, the 1947 Congress recognized that "most employees have an arguably confidential relationship with management" (*Union Oil of California, Inc.* v. *NLRB*, 607 F.2d 852, 853 (9th Cir. 1979)), and that the overall balance of the Act would be substantially altered if employees were to be deprived of the protection of the Act on that basis. If Congress had intended to rest such important rights upon such fragile ground, it certainly would have manifested that intention with greater clarity than the legislative record here suggests.

2. In contrast to respondents, amicus Chamber of Commerce concedes (Br. 9-10) that Congress rejected the House bill's broad definition of "confidential employee," in favor of continuing the Board's prior practice of treating as confidential employees only those with a "labor nexus." However, the Chamber contends (Br. 3) that the Board's present formulation of the "labor nexus" test is "not consistent with the Board's early decisional history and the [1947] congressional understanding" of that history. The Chamber asserts (Br. 3, 6-10, 20-21) that prior to *Ford Motor Co.*, 66 N.L.R.B. 1317 (1946), the Board treated as "confidential" all employees with access to their employer's labor relations information, which was broadly defined as "any information about 'wages, hours, and other terms and conditions of employment' " that had "not been released to rank-and-file employees[;]" that *Ford Motor* limited this exclusion so that employees with confidential labor relations information were excluded only if they assisted in a confidential capacity persons exercising managerial functions in the field of labor relations; and that because Congress was "apparently" unaware of *Ford Motor* in 1947, when it approved the "prevailing Board practice with respect to such people as confidential secretaries" (H.R. Conf. Rep. No. 510,

supra, at 35), Congress must therefore have intended to approve only the Board's earlier and allegedly broader "labor nexus" test. The Chamber's argument lacks merit because it misconstrues both the Board decisions that preceded *Ford Motor* and the effect of that decision.

a. At least eight years of Board decisions prior to *Ford Motor* disprove the Chamber's assertion that the Board was then broadly applying the "labor nexus" test to exclude from bargaining units any employee who had access to any confidential information relating to wages, hours, or other terms and conditions of employment. See NLRB Br. 18-20. In fact, the Board endeavored to limit this exclusion to situations in which employees had access to labor relations information with sufficient strategic significance so that its premature disclosure to the bargaining representative might disadvantage the employer in dealing with the representative.[4] On the one hand, the Board excluded from bargaining units confidential secretaries and clerks to managerial employees who had significant labor relations responsibilities, as well as nonsupervisory employees in labor relations, employment, and personnel departments

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[4] The Board's approach is well-demonstrated by its decision in *Hoover Co.*, 55 N.L.R.B. 1321, 1323 (1944):

> [I]n negotiating and in the settlement of grievances, the interests of a union and the management are ordinarily adverse. Consequently, we have adhered to the opinion that the management should not be required to handle labor relations matters through employees who are represented by the union with which the [c]ompany is required to deal and who in the normal performance of their duties may obtain advance information of the [c]ompany's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters.

Accord, *Brooklyn Daily Eagle*, *supra*, 13 N.L.R.B. at 986. See also NLRB Br. 17-19.

who had access to confidential information concerning the employer's position in collective bargaining negotiations or grievance matters (see NLRB Br. 19 nn. 16 & 17 (collecting cases)). On the other hand, the Board refused to exclude from bargaining units secretaries of managerial personnel who had little or no labor relations policy functions (see NLRB Br. 20 nn. 18 & 19 (collecting cases)) and other individuals who possessed only non-strategic, albeit otherwise confidential, information concerning labor relations or employee matters. Within the latter category were such persons as: payroll clerks with access to admittedly confidential information concerning employee wage rates, salaries, and earnings;[5] timekeepers with access to data on employee hours, output, and productivity;[6] accounting clericals with access to

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[5] See, *e.g.*, *Willys Overland Motors, Inc.*, 10 N.L.R.B. 160, 162 (1938) (payroll clerks, timekeepers, and time checkers with knowledge of employee earnings); *Western Union Telegraph Co.*, 30 N.L.R.B. 679, 685 (1941) (cashier who made wage disbursements); *Chrysler Detroit Co.*, 38 N.L.R.B. 313, 321 (1942) (payroll clerk with access to wage and salary information); *Murray Corp.*, 45 N.L.R.B. 854, 857 (1942) (cashier's office employees with access to payroll data); *Chrysler Corp., Chrysler Motor Div.*, 58 N.L.R.B. 239, 243 (1944) (payroll clerks who ensured that employee paychecks were in correct amount and who knew employee rates of pay and payroll deductions); *Micamold Radio Corp.*, 58 N.L.R.B. 888, 891 (1944) (payroll clerks with access to confidential information concerning pay and earnings of employees).

[6] See, *e.g.*, *Express Publishing Co.*, 8 N.L.R.B. 162, 167-168 (1938) (timekeepers and tally clerks with access to individual employee productivity data); *Chrysler Corp. (Marysville Plant)*, 36 N.L.R.B. 157, 161 (1941) (timekeepers with access to time card data); *Mueller Brass Co.*, 39 N.L.R.B. 167, 171-172 (1942) (checkers and timekeepers with records of each employee's output); *United Aircraft Products, Inc.*, 41 N.L.R.B. 501, 503-504 (1942) (separate unit of timekeepers with information about employee hours accrued, absences, and

projections on manpower needs and data on labor costs;[7] nurses and other employees with access to reports on employee health and disability matters;[8] plant guards and other employees with access to reports on employee misconduct;[9] and personnel clerks with access to files containing employment data con-

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tardiness); *Armour and Co.*, 49 N.L.R.B. 688, 690-691 (1943) (plant clerks who had information concerning production by individual employees and other information available "only to supervisory employees"); *General Motors Corp.*, 52 N.L.R.B. 649, 651, 656 (1943) (core and floor checkers with access to employee piecework data).

[7] See, *e.g.*, *Babcock & Wilcox*, 52 N.L.R.B. 900, 903 (1943) (accounting department employees with access to labor cost information); *Bethlehem Steel Co.*, 63 N.L.R.B. 1230, 1232-1233 (1945) (accounting division clericals with access to labor cost data); *Bethlehem-Sparrows Point Shipyard, Inc.*, 65 N.L.R.B. 284, 288 (1946) (planning and production department employees with access to projected manpower needs and labor cost studies).

[8] See, *e.g.*, *General Motors Corp., Chevrolet Motor Div.*, 53 N.L.R.B. 1096, 1105 (1943) (personnel clerks with access to employee injury reports); *Union Switch & Signal Co.*, 63 N.L.R.B. 974, 979-980 (1945) (stenographers and clerks in relief and pension department who handled matters concerning workmen's compensation and disability claims). See also *Continental Steel Corp.*, 61 N.L.R.B. 97, 99 (1945) (separate unit of nurses, notwithstanding their access to employee health records).

[9] See, *e.g.*, *Frigidaire Div., General Motors Corp.*, 39 N.L.R.B. 1108, 1112 (1942) (separate unit of plant guards with access to "highly confidential" FBI reports concerning employees); *Bethlehem-Hingham Shipyard, Inc.*, 60 N.L.R.B. 1075, 1078 (1945) (investigators conducting initial checks of employee absences and sick leave requests); *Aluminum Co.*, 61 N.L.R.B. 1066, 1073 (1945) (senior account clerk in position to discover employee "peculation"); *Pullman-Standard Car Manufacturing Co.*, 63 N.L.R.B. 822, 824-825 (1945) (plant guards conducting "clearly secret" investigations of employees for FBI and employer concerning thefts).

cerning other employees.[10] Likewise, the Board refused to exclude even employees having access to significant labor relations information, if it was principally historical and related to personnel actions and labor relations decisions already implemented;[11] if it

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[10] See, *e.g.*, *Puget Sound Bridge & Dredging Co.*, 46 N.L.R.B. 1071, 1074 (1943) (personnel clerks with access to historical information concerning each employee); *General Motors Corp.*, *supra*, 52 N.L.R.B. at 655 (timekeepers with access to personnel records listing hirings, transfers, and other personnel actions); *American Steel & Wire Co.*, 58 N.L.R.B. 253, 254-255 (1944) (hospital attendants with access to personnel records for purpose of obtaining information concerning health of employees); *South Bend Lathe Works*, 59 N.L.R.B. 562, 564 (1944) (clericals having access to personnel records to obtain payroll and wage data); *Aluminum Co.*, *supra*, 61 N.L.R.B. at 1072 (accounting and file clerks with access to company records containing confidential information concerning labor relations matters of "principally historical importance"); *American Central Manufacturing Co.*, 65 N.L.R.B. 342, 346-347 (1946) (payroll clerks with access to personnel files containing employment histories of company's employees).

Among other things, these cases clearly show that there is no substance to Hendricks' assertion that, prior to 1966, the Board mechanically excluded from bargaining units "any employees working in a personnel or employment department or with *access* to personnel information" (Br. 47; emphasis in original).

[11] See, *e.g.*, *Puget Sound Bridge and Dredging Co.*, *supra*, 46 N.L.R.B. at 1074 (personnel clerks with access to employment histories; current efficiency ratings kept in separate files); *Aluminum Co.*, *supra*, 61 N.L.R.B. at 1072 (file clerk with access to information concerning labor matters that were "no longer current"); *American Central Manufacturing Corp.*, *supra*, 65 N.L.R.B. at 346-347 (payroll clerks with access to personnel files, where there was "no evidence * * * that in the course of their employment they acquire advance information as to the [c]ompany's position on issues which are likely to be the subject of grievance conferences or collective bargaining").

was available only in an unformulated or raw form;[12] or if access to the information was sporadic or narrowly circumscribed by management.[13]

b. In 1946, of course, the Board concluded in *Ford Motor Co., supra*, 66 N.L.R.B. at 1322, that the "labor nexus" test, as previously applied, was "too inclusive and needlessly preclude[d] many employees from bargaining collectively together with other workers having common interests." Thus, the Board announced that it was limiting the term "confidential" so as "to embrace only those employees who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations" (*ibid.*).[14] In 1956, the Board reaffirmed

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[12] See, *e.g.*, *Frigidaire Div., General Motors Corp., supra*, 39 N.L.R.B. at 1112 (plant guards who "merely report the facts" concerning employee misconduct that may later be the subject of grievance proceedings); *General Motors Corp., Chevrolet Motor Div., supra*, 53 N.L.R.B. at 1105 (clerks with access to injury reports where employer's position on liability and compensation was formulated by individuals in separate division); *Bethlehem-Hingham Shipyard, Inc., supra*, 60 N.L.R.B. at 1078 (investigators who conducted only initial investigation concerning employee absences and sick leave requests); *Bethlehem-Sparrows Point Shipyard, Inc., supra*, 65 N.L.R.B. at 288 (planning and production department employees with access to projected labor cost data and manpower needs).

[13] See, *e.g.*, *General Motors Corp., Chevrolet Motor Div., supra*, 53 N.L.R.B. at 1107 (record clerks who "occasional[ly]" filed personnel department records); *Chrysler Corp., Chrysler Motor Div., supra*, 58 N.L.R.B. at 246 (office service department employees who handled labor relations information "in some small measure"); *Pacific Gas & Electric Co.*, 61 N.L.R.B. 564, 567-569 (1945) (payroll clerks with restricted access to personnel records).

[14] In *Ford Motor Co., supra*, the Board therefore upheld a bargaining unit composed of time-study employees, overruling such cases as *Yale & Towne Manufacturing Co.*, 60

this limitation in *B.F. Goodrich Co.*, 115 N.L.R.B. 722.

The Chamber, however, misconceives the import of *Ford Motor*. Contrary to the Chamber's assertions (Br. 3, 8), the Board's modification of the "labor nexus" test did not result in an exclusion limited to "the confidential assistants to a company's labor relations manager and virtually no one else," and it did not result in the inclusion in bargaining units of "most, if not all, of the employees excluded in cases like *Hoover*." Indeed, the Board has continued to treat as confidentials, not only secretaries and assistants to *all* persons with managerial functions in the field of labor relations (see, e.g., *Missouri Pacific Employees' Hospital Association*, 251 N.L.R.B. 1547, 1549-1550 (1980)), but also other individuals who have access to strategic labor relations information such as that described in *Hoover*. Thus, as the Board stated in *American Radiator & Standard Sanitary Corp.*, 119 N.L.R.B. 1715, 1720 (1958) (footnote

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N.L.R.B. 626 (1945), and *Consolidated Vultee Aircraft Corp.*, 54 N.L.R.B. 103 (1943), in which the Board had held such employees to be confidential or managerial. See 66 N.L.R.B. at 1322 & n.12.

The Board's modification in *Ford Motor* of the "labor nexus" test was fully described in a report (11 *NLRB Ann. Rep.* 32 & nn.18-21 (1947)) that was submitted to Congress on January 3, 1947, five months before the Conference Committee issued its report. It is therefore extremely unlikely that this modification "escaped the notice of Congress" (Chamber Br. 9). At all events, even if Congress was in fact unaware of the *Ford Motor* formulation, nothing in the Conference Report suggests that Congress would have disapproved this formulation if it had been brought to Congress' attention. Indeed, the conferees expressly approved (see H.R. Conf. Rep. No. 510, *supra*, at 35) the granting of statutory protection to the very group of employees—time-study personnel—which the Board had held *not* to be "confidentials" in *Ford Motor*, but which had been excluded under the Board's earlier practice.

omitted), "It is the Board's customary practice to exclude from bargaining units employees who act in a confidential capacity to officials who formulate or effectuate general labor relations policies, or who, in the course of their duties, regularly have access to information concerning anticipated changes which may result from collective-bargaining negotiations." [15] Likewise, in *Pullman Standard*, 214 N.L.R.B. 762-763 (1974), the Board stated:

> The Board has in the past denied eligibility in representation elections to those employees who, in the course of their duties, regularly have access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations.[2] We regard such employees as specially aligned with the employer's interests in the area of labor relations, even absent the showing of a confidential work relationship with a specifically identifiable managerial employee responsible for labor policy.

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[2] *American Radiator & Standard Sanitary Corporation*, 119 N.L.R.B. 1715 (1958).

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[15] In *American Radiator, supra*, 119 N.L.R.B. at 1720-1721, the Board refused to exclude as a confidential employee a personnel clerk who compiled statistical data, but had no knowledge of labor policy proposals which might result therefrom. Compare *American Lithofold Corp.*, 107 N.L.R.B. 1061, 1065 (1954) (excluding general bookkeeper and chief payroll officer with access to information concerning anticipated changes in employer's pay scale that would result from negotiations with the union); *Potomac Electric Power Co.*, 111 N.L.R.B. 553, 562 (1955) (excluding clerk-stenographers and clerk-typists "who in the course of their duties regularly have access to information concerning anticipated changes which may result from collective-bargaining negotiations"); *Triangle Publications, Inc.*, 118 N.L.R.B. 595, 596 & nn.3, 4 (1957) (excluding payroll clerks with access to data "showing the effect of wage adjustments contemplated in labor contract negotiations"); *Pullman Standard, Div. of Pullman, Inc.*, 214

c. In sum, the Board's reformulation in *Ford Motor* and *B.F. Goodrich* of the "labor nexus" test served to clarify this exclusion and enhance the consistency of its application, but did not significantly alter its scope.[16] Both before and after this reformulation, the "labor nexus" test was applied to exclude only those employees having access to confidential labor relations information which, if revealed to the union, could compromise the employer's position in collective bargaining or grievance matters. See *Liberty Homes, Inc.*, 216 N.L.R.B. 1102, 1106 (1975)

N.L.R.B. 762-763 (1974) (excluding labor costs estimators who regularly use employer documents disclosing managerial estimates of the anticipated results of future labor contract negotiations).

[16] The categories of employees principally affected by the modification, in addition to time-study personnel (see pages 12-13, note 14 *supra*), would appear to be secretaries or assistants to persons who merely effectuate—but play no part in the formulation of—management's labor policies. Compare *Minneapolis-Honeywell Regulator Co.*, 107 N.L.R.B. 1191, 1192 (1954) (excluding secretaries to department heads with supervisory duties who did not formulate labor policy), overruled in *B.F. Goodrich Co., supra*, 115 N.L.R.B. at 724 n.7, with *Eastern Corp.*, 116 N.L.R.B. 329, 333 (1956) (declining to exclude secretaries to department heads, but treating as "confidential" secretaries to vice president, treasurer, and service director who formulated labor policy). See also pages 16-17, note 17, *infra*. Thus, the Board has held that the tripartite *Ford Motor-B.F. Goodrich* "formulate, determine, and effectuate" test is to be applied "in the conjunctive" (*Weyerhaeuser Co.*, 173 N.L.R.B. 1170, 1172 (1968)), so that the exclusionary sweep of the test is limited to assistants to true "managerials" (as traditionally defined by the Board) in the field of labor relations. See *NLRB* v. *Yeshiva University*, 444 U.S. 672, 682 (1980), quoting *NLRB* v. *Bell Aerospace Co., supra*, 416 U.S. at 288 ("[m]anagerial employees are defined as those who 'formulate and effectuate management policies * * *' ").

(Board's policy is to exclude from bargaining units "employees, who by reason of duties which enable them to obtain their employer's secret labor relations information, would be in a position to pass such information on to the employees' bargaining representative").[17]

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[17] The cases cited by the Chamber (Br. 12-15) and Hendricks (Br. 22), in which the Board declined to confer confidential status on various employees, are not to the contrary. Several of these cases rest on specific factual findings by the Board that the individuals in question had no access to labor relations policy information: *United States Postal Service*, 232 N.L.R.B. 556, 558 (1978) ("[n]or does it appear that these secretaries have access to labor relations policy data"); *California Inspection Rating Bureau*, 215 N.L.R.B. 780, 783 (1974) ("[n]either employee is involved in typing correspondence nor preparing documentation or other information which is directly related to the labor relations functions of the unit"); *Hudson Waterways Corp.*, 193 N.L.R.B. 378, 380 n.7 (1971) (no evidence that employees in question were "actually privy to management's exchanging of views about labor policy in the performance of their regular duties"); *Hotel Employers Association*, 159 N.L.R.B. 143, 150 (1966) ("we find that these secretaries and clerks * * * are not sufficiently concerned with labor relations matters to be considered confidential employees"); *Westinghouse Electric Corp., Small Motor Div.*, 138 N.L.R.B. 778, 781 (1962) (industrial relations assistants "are not in a position to learn of matters relative to future policies, are not consulted in that regard, and have no access to information used by management in collective-bargaining negotiations").

With one exception, the rest of the Board decisions, upon which Hendricks and the Chamber rely, rest upon specific factual findings that the principals of the individuals whose status was at issue were not sufficiently involved with labor relations policymaking to raise any presumption that they had access to labor relations policy information: *California Inspection Rating Bureau, supra*, 215 N.L.R.B. at 783 (employees in question "do not work under an official who is directly involved in personnel decisions"); *Empire Mutual Insurance Co.*, 195 N.L.R.B. 284, 286 (1972) ("there is no evidence, and in fact there is no contention, that the [em-

3. For at least 40 years, therefore, the Board has excluded from bargaining units both confidential assistants to labor relations managerials and other employees having advance access to strategic labor relations information, but not employees who have access either to other types of labor-related information or to non-labor-related confidential information. Not only does the Board's rule safeguard the interest of employers in maintaining the confidentiality of strategic labor relations information, but it also accords full statutory protection to the greatest possible number of employees. It is because this rule reflects the fundamental policy of the National

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ployee's superior] formulates, determines, and effectuates management policy in the field of labor relations"); *Holly Sugar Corp.*, 193 N.L.R.B. 1024, 1025 (1971) (employee's superior made "mere administrative determinations" with respect to processing of "routine" grievances while "serious," "novel," and "policymaking" grievance matters were handled by higher management); *Weyerhaeuser Co.*, 173 N.L.R.B. 1170, 1172-1173 (1968) (secretaries' superiors were not "called upon to play any role in the formulation or determination of labor policies"); *Ethyl Corp.*, 118 N.L.R.B. 1369, 1371 (1957) (employees' superiors had "limited participation" in labor relations policy, confined to such matters as "accumulat[ing] factual data," but Board excluded as "confidentials" secretaries to members of employer's contract negotiating and labor relations policymaking committees); *Eastern Corp., supra*, 116 N.L.R.B. at 333 (employees' superiors had minor input of "advisory" nature in labor relations policymaking, but Board excluded as "confidential" secretaries to management officials who served in labor relations policymaking roles); *Curtiss-Wright Corp.*, 31 L.R.R.M. 1005 (1952) (employees' superior "does not make recommendations as to the disposition of grievances nor participate in meetings").

Finally, in *John Sexton & Co.*, 224 N.L.R.B. 1341 (1976), the Board found on the facts that the employee at issue did not enjoy a confidential relationship with her superior—either as a general matter, or with specific respect to labor relations matters.

Labor Relations Act, by maintaining a careful balance between these important and conflicting interests, that it has proved a workable guide for resolving an extremely delicate issue of labor-management relations during a period of substantial industrial change. Indeed, because the ever-increasing complexity of industrial and commercial life has greatly increased the number of employees who must have access to "confidential" information to perform their duties as employees, the balance of interests represented by the "labor nexus" test may now constitute a far more important part of American labor law than it was when first articulated. See NLRB Br. 37-39.

The Board's rule is based on the view, confirmed by 40 years of administrative experience, that there is no inherent incompatibility between "union membership * * * [and] an employee's duty of loyalty to his or her employer, even when that duty involves a responsibility to maintain confidentiality." *Dunn & Bradstreet, Inc.*, 240 N.L.R.B. 162, 163 (1979). Moreover, as the Board has often observed, the most effective means for discouraging breaches of confidentiality is "for the [e]mployer to discipline [offending employees], not for [the Board] to preclude their organizational freedom." *American Window Glass Co.*, 77 N.L.R.B. 1030, 1032 (1948). See also NLRB Br. 20-21.

These considerations apply not only to information concerning non-labor-related matters (such as trade secrets and customer lists),[18] but also to most personnel and labor relations information (whether it be confidential information concerning wages and

[18] Unlike Hendricks and Malleable, the Chamber concedes that access to non-labor-related confidential information should not deprive employees of the full protection of the Act. See Chamber Br. 2, 3-4, 9-10, 19.

hours, raw data from which labor policy decisions will be made, or information concerning personnel decisions already reached). Employees have no more incentive to disclose such nonstrategic labor-related information, simply because they are union members, than they have to disclose other types of confidential information.[19]

On the other hand, the Board's rule recognizes that strategic labor relations information stands on an altogether different footing. The relationship of employers and employees is clearly and necessarily an adversarial one with respect to negotiations over terms and conditions of employment and the resolution of grievances. See *Hoover Co., supra*, and *Brooklyn Daily Eagle, supra*. In such circumstances, there

[19] For example, it may be assumed that employees will be curious to compare the wages they earn with those earned by other employees. There is no reason to assume, however, that union members would be more curious about such matters than non-union employees, or that such curiosity would be more likely to cause union members to breach a duty of confidentiality. Indeed, the contrary may well be true because employees who are union members, unlike non-union employees, have available a legitimate and lawful means for compelling the disclosure of such information. Under Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), an employer must furnish to the employees' bargaining representative any information that is relevant to the representative's ability to bargain effectively on behalf of the unit (see *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 152-154 (1956)), and it is beyond cavil that information directly related to the mandatory subjects of bargaining enumerated in Section 8(d) of the Act, 29 U.S.C. 158(d)—namely, "wages, hours, and other terms and conditions of employment"—is sufficiently "relevant" to bargaining to require its disclosure by the employer. See, *e.g.*, *Whitin Machine Works*, 108 N.L.R.B. 1537, 1538-1539 (1954), enforced, 217 F.2d 593 (4th Cir. 1954), cert. denied, 349 U.S. 905 (1955); *Boston Herald-Traveler Corp.* v. *NLRB*, 223 F.2d 58 (1st Cir. 1955).

is an obvious incentive for employees privy to such strategic information to breach their duty of confidentiality and share such information with their bargaining representative, who may be able to use it in obtaining concessions from the employer. This incentive is sufficiently strong to warrant the exclusion of such employees from the bargaining unit. Moreover, the potential damage to the employer is far greater with respect to a breach of confidentiality concerning strategic labor relations information than in the case of other confidential labor-related information.[20] It is eminently reasonable, therefore, for the Board to treat as "confidential employees" under the Act only those who have access to confidential labor relations information which, if prematurely revealed to the union, could compromise the employer's position in collective bargaining negotiations or grievance matters.

The judgments of the court of appeals should be reversed insofar as enforcement of the Board's orders was denied.

Respectfully submitted.

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SEPTEMBER 1981

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[20] Unauthorized disclosures of non-strategic, but nonetheless confidential, labor-related information may be relatively harmless to the employer because, as we have suggested (see page 19, note 19, *supra*), employees who have a bargaining representative have lawful means for securing most of this type of information in any event. Conversely, if employees confide strategic labor relations information to their union representative, the employer's bargaining position will almost certainly be prejudiced. This potential for damage is particularly pernicious because an employer may not even be aware that a union is privy to its bargaining strategy.

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No. 80-885

IN THE

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October Term, 1980

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Petitioner

v.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

MALLEABLE IRON RANGE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question in this case is simply stated: are employees who have access to information which their employer con-

siders confidential excluded for that reason from the definition of "employee" in § 2(3) of the National Labor Relations Act ("the Wagner Act"), as amended by the Labor Management Relations Act (the "Taft-Hartley Act" or "LMRA"). In our analysis "[w]e begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 108.

The NLRA contains in § 2(3) an express and unambiguous definition of the term "employee": "The term 'employee' shall include any employee . . ." with certain stated exceptions (for, e.g., "agricultural laborers," "supervisors" as defined in § 2(11) and "independent contractors"), but there is no claim in this case that the workers whose status is at issue fall within the terms of any of these exceptions. Under a literal reading of the Act, then, the workers in question are "employees."

In seeking to exclude workers with access to confidential information from the reach of the Act, respondents therefore necessarily ask the Court to create an implied exception to the statutory definition of "employee." Respondents accordingly bear a heavy burden:

> Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy. . . . Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied. [*United States* v. *Rutherford*, 442 U.S. 544, 555 (1979)]

The court below, without adverting to the limits on the judicial power to imply exceptions to a congressional enactment, found that an exception for "confidential" employees was warranted by the legislative history of the LMRA's

express exclusion of "supervisors" from the definition of "employee." We thus turn to that legislative history to determine whether the failure to create a judicially-implied exception for confidential employees, would lead to "consequences obviously at variance with the policy of the enactment as a whole," *id.* at 552.

The 1947 Congress' purpose in excluding "supervisors" from the term "employee" was to draw the line between management and labor for purposes of the NLRA so as to assure that persons holding positions at the rank of foreman or above would be excluded from the Act. The House was of the view that the line should be drawn at a lower level so as to exclude confidential employees as well. The Senate, however, successfully insisted in conference on its more limited exclusion. The House Managers stated, "the conference agreement, in the definition of 'supervisor,' limits such term to those individuals treated as supervisor under the Senate amendment." 1 Legislative History of the Labor Management Relations Act, 1947 (GPO 1948) at 539. And the House Managers and Senator Taft in describing the conference agreement, both added that "the Senate amendment confined the definition of 'supervisor' to individuals generally regarded as foremen and persons of like or higher rank." *Id.* at 539, 1537. There is no evidence that Congress considered confidential employees—secretaries, typists, clerks, telephone operators, salesmen, engineers, and the like—to be of "higher rank" than foremen.

The court below, following a dictum in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 283-284 (1974), reasoned that Congress believed that all confidential employees had been excluded from the Wagner Act by NLRB decisions and that Congress intended to freeze that interpretation of the Wagner Act into the law. In a long and consistent line of pre-1947 decisions, however, the National Labor Relations Board had held that the mere fact that an employee has access to "confidential" information is *insufficient* to deny that employee the protection of the Act but that employees

with access to confidential *labor relations* information are *not* eligible to engage in collective bargaining. Our research has revealed over 60 such decisions between 1941 and 1947 in which the Board adhered to this fundamental distinction.

In concluding that the Congress that enacted the LMRA completely misunderstood these Board's decisions, the court below relied exclusively on the statement of the House Managers, echoed by Senator Taft, explaining the conference report:

> In the case of persons working in the labor relations, personnel and employment departments, it was not thought necessary to make specific provisions, as was done in the House bill, since the Board had treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. [Leg. Hist. at 539-40.]

The most plausible interpretation of these words is that the House Managers and Senator Taft meant that employees involved in labor relations, personnel and employment functions, and confidential secretaries to such persons had been excluded by the Board from the Act's benefits. That is, in essence, where the Board law as of 1947 stood. Thus the Managers' statement provides no warrant for concluding that Congress intended to exclude *all* "confidential employees" from the NLRA.

More fundamentally, the House Managers' statement does not at all indicate an intent to freeze the Board law into place. In enacting the LMRA, Congress understood well the difference between legislating and not legislating. To read the statement as a basis for excluding all confidential employees is to negate the conference decision *not* to adopt the House definition of "supervisors", which, as noted above, would have expressly excluded confidential employees. The legislative materials relied on by the lower court, in short, simply do not constitute a binding in-

struction to the Board requiring the agency to treat all confidential employees as outside the Act. Thus, while *Bell Aerospace's* basic holding on the status of managerial employees is sound, the dictum in that case on the status of confidential employees (and the decision below which rests on that portion of the opinion) cannot be squared with congressional intent, and should be "recede[d] from" now that the issue of the status of confidential employees is "squarely presented." *NLRB* v. *Boeing Co.*, 412 U.S. 67, 72 (1973).

ARGUMENT

To understand the legislative history of the exclusion of "supervisors," as defined in § 2(11), from the NLRA's definition of "employee" (§ 2(3)) and the significance of that history for the question presented here concerning the status of confidential employees, it is first necessary to examine the background against which Congress legislated in enacting the exclusion of supervisors, as part of the LMRA. We begin, therefore, with the Wagner Act, and with the National Labor Relations Board's interpretation of that Act.

A. The NLRB's Pre-1947 Rules Concerning Confidential and Supervisory Employees.

Section 2(3) of the Wagner Act defined "employee" much as existing law does:

> The term 'employee' shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

Notwithstanding the apparent clarity of this definition, within a few years after the enactment of the Act the Board was confronted with questions as to the applicability of the Act to various categories of employees, including confidential employees and supervisory employees.

The Board had little difficulty in concluding that the mere fact that an employee has access to information which the employer wanted to keep confidential is insufficient to deny that employee the protection of the Act. In *Bull Dog Electric Products Co.*, 22 NLRB 1043 (1940) the Board recognized as appropriate a bargaining unit of draftsmen and engineers notwithstanding the employer's argument that the members of the putative bargaining unit were not "employees within the meaning of the Act" because, *inter alia*, "they are entrusted with confidential matters." *Id.* at 1046. The Board reiterated that holding, one year later, in *Creamery Package Manufacturing Co.*, 34 NLRB 106 (1941), stating, "The possession of important information is of itself insufficient to justify exclusion from the right to collective bargaining." And by 1943 the Board viewed this as a well-established rule: "We have frequently held that the possession of information which the employer regards as secret is not of itself sufficient to justify depriving employees of their right to collective bargaining, since there is, in our opinion, no necessary conflict between self-organization and collective bargaining, and the faithful performance of duty." *Colonial Branch Co.*, 53 NLRB 846, 848 (1943).[1]

While deciding that employees with access to secret information are not generally excluded from the Act, the Board concluded that different treatment was required for a small group of "confidential" employees: those with access to confidential information *concerning the employer's labor relations.* In *Brooklyn Daily Eagle*, 13 NLRB 974, 986 (1939), the Board excluded from a bargaining unit the secretaries to the managing editor and editor of the newspaper-employer, but not the secretaries to the advertising manager, classified advertising manager and circulation manager:

> We take notice of the fact that in negotiating and in other dealings concerning grievances, the interests of

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[1] As to the well-established nature of the Board's rule, see also pp. 7-8, *infra*.

> a union and the management are ordinarily adverse. The nature of a personal secretary's work is such that much of the confidential material pertaining to the management passes through his or her hands. We believe that the management should not be required to handle such material through employees in a unit represented by the unit with which [management] is dealing.

Three years later the Board stated its position as follows: "[E]mployees are to be excluded from the bargaining unit on the ground of the confidential nature of their employment only if they have access to confidential information which relates directly to the problem of labor relations. . . ." *Poultrymen's Service Corp.*, 41 NLRB 444 (1942), *enforced*, 138 F.2d 204 (3d Cir. 1943). Indeed, as the Board made plain in *Electric Boat Co.*, 57 NLRB 1348 (1944):

> [T]he shop clerks in the course of their duties acquire such confidential knowledge of labor relations matter as would warrant their exclusion from any bargaining unit otherwise found to be appropriate and, equally, render inappropriate any unit composed solely of such employees.

See also Hoover Co., 55 NLRB 1321 (1944).[2]

The distinction the NLRB thus drew, between employees the Board defined as "confidential"—those with access to confidential, labor-relations information—and employees not so defined despite their access to other types of secret information, was quickly cemented into the law. *Our research has revealed over sixty cases, decided between 1941 and 1947, in which the Board adhered to this fundamental distinction*, including within bargaining units em-

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[2] While holding that employees with access to confidential, labor-related information had no right to bargain collectively (because there is no appropriate bargaining unit for such employees), the Board *rejected* the argument that such employees fell outside the statutory definition of "employee," *Bethlehem Steel Co.*, 63 NLRB 1230, 1232 (1945), and had no rights under the Act, *Southern Colorado Power Co.*, 13 NLRB 699, 710 (1939).

ployees of the latter type and excluding employees of the former type.[3] To be sure, in *Ford Motor Co.*, 66 NLRB 1317, 1322 (1946), the Board modified its definition of confidential employees slightly by holding that even employees with "access to confidential data bearing directly upon the employer's labor relations" would not be deemed to be "confidential employees," outside all bargaining units, and that "only those employees who assist and act in a confidential capacity to persons who exercise *'managerial' functions* in the field of labor relations" were excluded from collective bargaining. But while the exact dividing line was altered somewhat, the basic distinction between employees with labor relations information and other employees remained undisturbed.

At the same time that the Board was resolving the confidential employee issue, the Board also was grappling, far less consistently, with the supervisory employee question. The tortuous path of the Board's decisions in this area is well known to this Court, see *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 277-78 (1974), *Beasley* v. *Food Fair of North Carolina*, 416 U.S. 653 (1974) and need not be retraced here. Suffice it to say that after adopting several inconsistent positions, the Board, in *Packard Motor Co.*, 61 NLRB 4 (1945) finally held foremen could constitute an appropriate unit for collective bargaining. By a 5-4 vote, this Court affirmed. *Packard Co.* v. *Labor Board*, 330 U.S. 485 (1947).

B. The Case Bill

1. *House Consideration*

While *Packard Motor* was still pending before this Court, efforts began in Congress to overturn the Board's decision legislatively. In 1946, Representative Francis Case introduced the Case Bill, the precursor of the LMRA,[4] which

[3] The cases are listed in an Appendix to this brief.

[4] *See Complete Auto Transit Inc.* v. *Reis.* —— U.S. ——, 49 L.W. 4473, 4475 (1981); *Florida Power & Light* v. *Electrical Workers*, 417 U.S. 790, 811 n. 20 (1974); *Arroyo* v. *United States*, 359 U.S. 419, 425-427 (1959).

included a section intended to overrule *Packard Motor* by expressly excluding "supervisory employees" from the definition of "employee" under the Wagner Act. As originally drafted, the Case bill contained a broad definition of "supervisory employees."[5] On the floor of the House, however, several Representatives expressed concern over the breadth of the definition, *e.g.*, 92 Cong. Rep. 681 (Rep. Landis), 756 (Rep. McConnell), and an amendment was offered by Rep. Landis to narrow the definition and thereby assure that "[a]ll of those people who do manual productive work should have a right to collective bargaining," *id.* at 844.[6] Rep. Case endorsed the amendment, *ibid.* After brief debate it was approved, *id.* at 850. As thus amended, the Case bill passed the House, *id.* at 1070. No mention was made during the House debates of any dissatisfaction with the NLRB's treatment of confidential employees, nor was

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[5] "Supervisory employees: (a) As used in this section, the term 'supervisory employee' means an employee whose duties include—

(1) the direction or supervision of the activities of other employees; or

(2) the computation of the pay of other employees; or

(3) the determination of the time worked by other employees; or the supervision or administration of the factors on the basis of which the pay of other employees is computed."

[6] The Landis amendment produced the following definition (the changes are italicized):

"Supervisory employees: (a) as used in this section, the term 'supervisory employee' means an employee *whose primary duties consist of:*

(1) the direction or supervision of other employees *but who regularly do no productive manual* work; or

(2) the computation of the pay of other employees *and does not include persons who are selected by productive workers under established practice;*

(3) the determination of the time worked by other employees; or the supervision or administration of the factors on the basis of which the pay of other employees is computed."

any attempt made to overturn the settled Board law on that issue.

2. *Senate Consideration*

When the Case bill reached the Senate, it was referred to the Senate Committee on Education and Labor. The majority of that Committee concluded that there should not be a unitary solution to the problem of supervisory employees; the majority reasoned that "in small enterprises [where] the supervisor is identified with the management of the business," the supervisor should be excluded from collective bargaining, whereas in "gigantic industrial concerns," in which there is "little such identification" and in which "the supervisory employee . . . is no more secure than that of the rank-and-file production employee and . . . is equally at the mercy of management," the supervisors should be permitted to engage in collective bargaining. S. Rep. No. 1177, 79th Cong. 2d Sess. at 9-10 (1946). Accordingly, the majority concluded that "this subject is not a proper matter for legislative disposition" (*id.* at 9) and decided "to leave the matter where it now stands, in the hands of the Board for decision in individual cases as they arise." *Ibid.*

A minority of the Senate Committee(Senators Ball, Taft and Smith) disagreed. In their minority report (at 17) these Senators proposed an amendment which they described (at 4, 18) as "an improved version" of the Case bill "rewritten . . . so that it is restricted to true supervisory employees."[7] The minority justified its amendment

[7] "(a) As used in this section the term 'supervisory employee' means an employee whose primary duties consist of the direction or supervision of the activities of other employees but who regularly devotes less than 20 percent of his time to productive manual work and who acts as the employer's agent in disciplinary action regarding employees under his supervision, but does not include any employee within the purview of the Railway Labor Act.

(b) Hereafter, no supervisory employee shall have the special status or rights of an 'employee' as defined and provided in the National Labor Relations Act.

as an effort to distinguish workers from management by including supervisors in the latter category and thus exempting them "from the coverage of the NLRA".

> NLRB now says everybody is an "employee." Unless the line is drawn by law at the point between actual production workers and the lower ranks of actual management, where is the line to be drawn? Is the level of those subject to organization to be raised by successive steps until all employees of a company, including the president and other officers, are in the production union, and thus subject to union "discipline"? [*Id.* at 19].

On the floor of the Senate, Senator Ellender offered a revised version of the supervisors amendment on behalf of a number of Senators, including the Committee minority, 92 Cong. Rec. 5968.[8] Like the Committee minority, Senator Ellender stressed:

> I believe that the language of this amendment is

(c) Nothing herein shall prohibit a supervisory employee from becoming or remaining a member of a labor organization."

[8] The Ellender amendment defined supervisor as follows:

The term 'supervisor' means any individual having authority, in the interest of the employer—

(a) to hire, transfer, suspend, lay off, recall, promote, demote, discharge, assign, reward, or discipline any employee of the employer, or to adjust their grievances, or to effectively recommend any such action; or

(b) to determine, or make effective recommendations with respect to the amount of wages earned by any employees, or to apply, or to make effective recommendations with respect to the application of, the factors upon the basis of which the wages of any employees are determined, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; but such term shall not include any individual in an occupation of a character which under prevailing custom prior to July 1, 1935 was covered by collective-bargaining agreements.

> more clearly adapted . . . to express the real intent of Congress, since it would exclude from the protection of the act only those supervisors traditionally regarded both by industry and labor as being a part of management . . .
>
> Since there is considerable variance in industry with respect to the duties of supervisory employees, and since it was not the intent of this amendment to exempt any employee who does not possess genuine and important supervisory duties, the text of the amendment defines the term 'supervisor' in very much the same language which the Board itself has used . . . [*Ibid.*] [9]

The amendment was adopted by the Senate, *id.* at 5705. Thereafter, the bill passed the Senate, *id.* at 5739. As in the House, no member of the Senate expressed any dissatisfaction with the Board's treatment of confidential employees or any intent to disturb the Board's decisions.

The Senate bill was returned to the House, which concurred in the Senate amendments, *id.* at 5946. The bill was vetoed by President Truman, however, *id.* at 6674-78, who expressed disagreement with numerous provisions in the bill including the provision concerning supervisory employ-

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[9] Senator Hawkes, a cosponsor of the amendment, added the following justification:

> I believe that the Senator from Louisiana has devised a very good definition, which sets forth clearly the dividing point between those who are in management and those who are rated as regular employees. . . .
>
> It seems to me there is nothing more important than to separate these two groups . . .
>
> . . . I ask, how can a man bargain with himself successfully regarding the rights of others? . . .
>
> . . . In fact, I go so far as to say that I cannot personally see how a man can remain in the ranks of management, if he is affiliated in the ranks of a labor union. [*Id.* at 5699; see also *id.* at 5700 (Senators McClellan & Hawkes), *id.* at 5703 (Senator Ball).]

ees, *id.* at 6677.[10] The House failed to override the veto, *id.* at 6678.

C. The Labor Management Relations Act of 1947

Following the 1946 elections, in which the Republicans gained control of both houses, Congress resumed work on a labor bill.

1. *House Consideration*

The LMRA started in the House as the Hartley bill which was reported to the House after 31 days of hearings by the Education and Labor Committee. Like the Case bill, the Hartley bill included a provision to exempt "supervisors" from the definition of "employee" in the NLRA. The first paragraph of the definition of the term "supervisor" in the Hartley bill, as reported by the House Committee on Education and Labor, came almost verbatim from the Ellender amendment of the prior year.[11] But the Hart-

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[10] "This section would strip from supervisory employees the rights of self-organization and collective bargaining now guaranteed them. . . .

This complex question has long been under consideration by the National Labor Relations Board. The Board and the courts have pointed out that supervisory employees have a dual capacity. In dealing with the employees under them, they act for management. However, with respect to their own wages, hours of work, and other terms and conditions of employment, they act for themselves. The full right of supervisory employees to the benefits of collective bargaining is one that cannot be lightly thrown aside.

On the other hand, management is entitled to proper protection. Somewhere in the area of disagreement between the parties the line can be drawn with reasonable accuracy. There has been no attempt to draw that line in this section." [*Id.* at 6677]

[11] "The term 'supervisor' means any individual—

(A) who has authority, in the interest of the employer—

(i) to hire, transfer, suspend, lay off, recall, promote, demote, discharge, assign, reward, or discipline any individuals

ley bill also included within the definition of "supervisor" two additional paragraphs addressed *inter alia* to the status of employees with access to secret information:

> The term "supervisor" means any individual—
>
> (B) who is employed in labor relations, personnel, employment, police, or time-study matters or in connection with claim matters of employees against employers, or who is employed to act in other respects for the employer in dealing with other individuals employed by the employer, or who is employed to secure and furnish to the employer information to be used by the employer in connection with any of the foregoing; or
>
> (C) who by the nature of his duties is given by the employer information that is of a confidential nature and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employers. [Leg. Hist. at 41]

The Committee Report accompanying the Hartley bill (H.R. Rep. 245), 80th Cong. Sess. (1947)) paid scant attention to these latter paragraphs of the definition of "supervisor." The thrust of the six-page discussion of this provision (at 13-18, 23) was to justify the proposal to exclude foremen from the Wagner Act.[12]

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employed by the employer, or to adjust their grievances, or to effectively recommend any such action; or

(ii) to determine, or make effective recommendations with respect to, the amount of wages earned by any individuals employed by the employer, or to apply, or to make effective recommendations with respect to the application of, or the factors upon the basis of which the wages of any individuals employed by the employer are determined, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the exercise of independent judgment." [1 Legislative History of the Labor Management Relations Act, 1947 (GPO, 1948) at 40-41 (hereinafter "Leg. Hist. at ——").]

[12] The Committee Report traced the history of the Board's treatment of foremen, and decried at length the evils that flow "when the foremen unionize," *id.* at 305. Thus the Committee concluded:

Towards the end of the discussion, the House Report made relatively brief reference to the provisions of the "supervisor" definition which concerned persons with access to confidential information:

> Labor relations people negotiate labor agreements and handle disputes not settled in the shops. Employment and personnel people hire workers, and sometimes assign them to their departments. Plant policemen and guards prevent disorders and report misconduct of employees and of unions and their members. Time-study men help to fix the pace at which employees work and to determine the number of men the work calls for. Doctors, nurses, safety engineers, and adjusters handle

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> If management is to be free to manage American industry as in the past and to produce the goods on which depends our strength in war and our standard of living always, then *Congress must exclude foremen from the operation of the Labor Act, not only when they organize into unions of the rank and file and into unions affiliated with those of the rank and file, but also when they organize into unions that claim to be independent of the unions of the rank and file.*
>
> • • •
>
> Supervisors are management people. They have distinguished themselves in their work. They have demonstrated their ability to take care of themselves without depending upon the pressure of collective action. No one forced them to become supervisors. They abandoned the 'collective security' of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such 'security.' It seems wrong, and it is wrong, to subject people of this kind, who have demonstrated their initiative, their ambition and their ability to get ahead to the levelling process of seniority, uniformity, and standardization that the Supreme Court recognizes as being fundamental principles of unionism. . . . It is wrong for the foremen, for it discourages the things in them that made them foremen in the first place. For the same reasons . . . it is wrong for industry, and particularly for the future strength and productivity of our country. [*Id.* at 305, 307-308; emphasis in original.]

> claims for disability benefits and investigate alleged hazards to safety and health.
>
> Other employees handle intimate details of the business that frequently are highly confidential. Some affect the employer's relations with labor. Others affect its relations with its competitors. In neither case should the employee's loyalty be divided. That which affects the company's relations with its competitors certainly ought not to be open to members of a union that deals also with the firm's competitor. [*Id.* at 307]

And at a later point, in commenting specifically on the definition of "supervisor," the Report added the following:

> The substantive language . . . is consistent with that of the Case bill, which passed Congress last year. The only important change concerns confidential employees. These are people who receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally. Most of the people who would qualify as 'confidential' employees are executives and are excluded from the act in any event.
>
> The Board itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these. But protecting confidential financial information from competitors and speculators, protecting secret processes and experiments from competitors, and protecting other vital secrets ought not to rest in the administrative discretion of the Board or the responsibility of whatever union happens to represent the employees. The bill therefore excludes from the definition of employees persons holding positions of trust and confidence whose duties give them secret information. [*Id.* at 314]

On the floor of the House, the proposal to exempt confidential employees from the Act was scarcely mentioned. In his opening statement, Rep. Hartley referred only to the exemption of foremen, *id.* at 613. Few proponents of the bill even noted the provision concerning supervisors, and those who did ignored its impact on confidential employees, *id.* at 646 (Rep. Gwinn); 868 (Rep. Meade). After several days debate, the Hartley bill passed the House.

2. Senate Consideration

While the House was at work on the Hartley bill, the Senate Committee on Labor and Public Welfare, chaired by Senator Taft, had before it a labor bill introduced by the chairman. The committee held six weeks of hearings, see Leg. Hist. at 1005, after which, as Senator Taft advised the Senate when the bill reached the Senate floor, the Committee attempted to "correct" each "injustice" found, *id.* at 1007.

Significantly, the bill the Senate Committee reported did not contain a provision aimed at the status of confidential employees. Rather, the Senate bill, like the Case bill, sought only to overturn *Packard Motor* by treating supervisors as "management" and thus removing them from the protection of the NLRA. The Committee explained:

> A recent development which probably more than any other single factor has upset any real balance of power in the collective-bargaining process has been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the union of the very men they were hired to supervise. It was not until 1945, after several changes in position, that the National Labor Relations Board itself by divided vote finally decided that supervisory employees were covered by the National Labor Relations Act. This construction was recently upheld in the Supreme Court in the *Packard Motor Car case* (decided March 10, 1947). . . . This means, as Mr. Justice Douglas pointed out in his dissenting opinion—and as Board counsel conceded in argument—that unless Congress amends the act in this respect its processes can be used to unionize even vice presidents since they are not specifically exempted from the category of 'employees.'
>
> • • •
>
> By drawing a more definite line between management and labor we believe the proposed language has fully met some of the technical criticisms to the corresponding section referred to in the President's veto of [the Case] bill. [*Id.* at 409-11]

The Committee's definition of "supervisor" in the bill as reported closely tracked the language the Congress had adopted one year earlier;[13] as the Committee explained:

> In framing this definition, the committee exercised great care, desiring that the employees herein excluded from the coverage of the act be truly supervisory. The language in the proposed amendment is patterned after that contained in the Ellender amendment to last year's Case bill . . . [*Id.* at 423]

Indeed, prints of the committee's earlier drafts show that the committee considered and rejected broader definitions of the term "supervisor."[14]

On the floor of the Senate, proponents of the Taft bill stressed the limited nature of the provision on supervisors. In his opening statement for example, Senator Taft explained the provision as follows:

> It is felt very strongly by management that foremen are part of management; that it is impossible to manage a plant unless the foremen are wholly loyal to the management. . . .
>
> The definition of foremen is applied to persons who are strictly foremen. *We have not extended it to timekeeps or guards or any of the others about whom controversy has arisen.* [*Id.* at 1008-09]

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[13] The Committee bill defined supervisor as follows:

> (11) The term 'supervisor' means any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. [*Id.* at 104]

[14] The committee prints are contained in Labor Management Relations Act: Bills, Reports and Documents, Volume IV; a legislative history of the LMRA which apparently was compiled by this Court. *See, e.g.*, print of March 21, 1947, p. 7.

Senator Ellender likewise explained that the section was designed to overrule *Packard Motor* which, he stated, would permit "even the vice presidents working for a large corporation . . . [to] compel their employer to recognize them." (*Id.* at 1064). In a colloquy with Senator Aiken, the ranking majority member of the Labor and Public Welfare Committee, the narrowness of the provision was emphasized:

> Mr. AIKEN. The Senator will recall and I think it should be in the Record, that the definition of a supervisory employee was considerably changed in committee. As originally written into the bill, it included night watchmen, time-study men, all guards, *and many other types of workmen, who very clearly were not supervisors.*
>
> Mr. ELLENDER. The Senator is correct.
>
> Mr. AIKEN. The committee then more closely defined the word 'supervisor,' to include supervisors in fact, *rather than all the other groups of employees whom some employers would like to have had included in the list of supervisory employees,* so that such employees would not be able to join the union and gain the benefits of the Labor Relations Act.
>
> • • •
>
> Mr. AIKEN. In dozens of cases labor wanted nothing whatever to be done, while *industry wanted to include in the definition of 'supervisor' any number of occupational employees who had no business whatever being included in the definition of 'supervisor.' The committee simply had to work out for itself what it thought was a proper definition of a supervisor.*
>
> Mr. ELLENDER. The Senator is correct.
>
> • • •
>
> Mr. ELLENDER. Let me state to the distinguished Senator that the definition adopted by our committee is the one that has been put into practice for several years last past by the NLRB.
>
> Mr. AIKEN. This is correct. The committee said they should be supervisors, in fact.
>
> • • •

> Mr. AIKEN. On the other hand, going on the other side of the fence to an extreme, the Senator will recall that the original bill included in its category of supervisors those who guarded the health of the employees, and that a difference of opinion arose among lawyers who were in the committee room at the time, as to whether this included the washroom attendants or not, some saying yes, others saying no.
>
> Mr. ELLENDER. That is correct.
>
> Mr. AIKEN. In any case, they were not foremen. [*Id.* at 1064-65; emphasis added.]

Senator Ellender ended his discussion of the subject by noting, "The definition given in this bill is not nearly as broad as the one which was included in the Case bill of last year. . . ." *Id.* at 1068; see also *id.* at 1148 (Senator Smith). The committee's version of § 2(11) passed the Senate with only minor modifications.[15]

3. *The Conference Report and the Presidential Veto.*

The differences between the House and Senate bills on this and other issues were submitted to conference. The Conference Committee prepared a "Comparative Print" which included a "Statement of Major Points of Difference" between the House and the Senate. The definition of "supervisors" was one such difference:

> House—Excludes not only supervisors within the meaning of current Board formula but also persons whose duties require them to make determinations respecting the amount of wages earned, for example, inspectors, weighmasters etc. Definition also excludes guards, time study men, and confidential employees.
>
> Senate—Supervisory definition would exclude only bona fide supervisors.[16]

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[15] The Senate adopted an amendment by Senator Flanders to include within the definition of supervisor those with "responsibility to direct" employees. *Id.* at 1303-04.

[16] The Comparative Print, dated May 16, 1947, is reprinted in Labor Management Relations Act: Bills, Reports and Documents, *supra* n. 14.

In conference, the Senate prevailed on the scope of the supervisor provision; the Senate version, without the amendment made on the Senate floor (see n. 15, *supra*), was incorporated verbatim into the Conference Committee bill. In a written summary inserted in the Congressional Record, Senator Taft reported the conference action to the Senate as follows:

> (8) Supervisors: Both the House bill and the Senate amendment excluded supervisors from the individuals deemed to be employees for the purposes of the act. There was a sharp divergence between the House and Senate, however, with respect to the occupational groups which fell within this definition. *The Senate amendment, which the conference ultimately adopted, is limited to bona fide supervisors.* The House had included numerous other classes. There were generally (A) certain personnel who fix the amount of wages earned by other employees, such as inspectors, checkers, weighmasters, and time-study personnel, (B) labor relations personnel, police, and claims personnel, and (C) confidential employees. The Senate amendment confined the definition of supervisor to individuals generally regarded as foremen and employees of like or higher rank. [*Id.* at 1537; emphasis added]

And in remarks on the floor Senator Taft added:

> Mr. President, there are many minor provisions • • • We accepted a provision regarding plant guards. We had exempted foremen in the Senate bill, but we had not exempted plant guards. The House bill exempted plant guards, and also time-study employees and personnel forces. *We did not accept any of those provisions,* except that as to plant guards we provided that they could have the protection of the Wagner Act only if they had a union separate and apart from the union of the general employees. [*Id.* at 1544]

The House conferees, in their report conceded defeat: "The conference agreement, in the definition of 'supervisor,' limits such term to those individuals treated as

supervisor under the Senate amendment." *Id.* at 531.[17] And on the floor of the House, Rep. Hartley, rather than boasting of what had been accomplished in conference, lamented:

> I would much rather have seen the House bill as it originally passed enacted into law, but I want to see a bill that can be enacted into law passed by this Congress.
>
> • • •
>
> I also want to make it perfectly clear that there was no concession made except upon the assurance that it would provide us votes in another body to be certain that the legislation would be enacted into law. [*Id.* at 882, 84] [18]

As anticipated, the Taft-Hartley bill was vetoed by President Truman. *Id.* at 915-22. The veto was overriden by a vote of 331-83 in the House, *id.* at 922-23, and a vote of 68-25 in the Senate, *id.* at 1057. Accordingly, the LMRA became law.

D. The Lessons of the Legislative History

The lessons which emerge from this legislative history, we submit, are as follows:

First, it is clear that the purpose of § 2(11) was to overturn *Packard Motors* and to do so by drawing the line between management and labor so as to assure that persons holding positions at the rank of foreman or above would be excluded from the Act.

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[17] The House conferees, and Senator Taft in his written statement, explained in identical terms the decision not to take legislative action with respect to confidential employees; we quote that explanation and discuss its significance *infra* at 26-29.

[18] The concern with securing sufficient Senate votes to override a veto had been a recurring theme in the Senate debates, with Senators who themselves favored additional provisions arguing against adoption of such provisions because of the need to obtain two-thirds approval of the bill. *See, e.g.,* Leg. Hist. at 1077 (Sen. Ellender); 1365-66 (Sen. Taft). *Cf., Pipefitters* v. *United States,* 407 U.S. 385, 409 (1972).

Second, the issue of confidential employees was, at most, a peripheral concern; it was not mentioned at all during the consideration of the Case bill, received scant attention in the House Committee report accompanying the Hartley Bill, and was not discussed during the debates in the House and the Senate in 1947 or in the Senate Committee Report.

Third, while the *House* was at least willing to go along with the Hartley Bill's exclusion of employees with access to confidential information from the reach of the NLRA, the Senate was never asked to do so—and never expressed a willingness (let alone a desire) to do so. To the contrary, the *Senate* was expressly told by Senator Taft that "the definition of foreman is applied to persons who are strictly foremen. *We have not extended it to* timekeepers or guards, or *any of the others about whom controversy has risen*" (p. 18 *supra*). Thus, the issue put to the Senate was whether to group foremen with management and to exclude "management" as thus demarcated from the NLRA. And the Senate agreed to that course only after repeated assurances that the bill before it had been very narrowly drawn.

Finally, the ultimate decision Congress made was not to legislate with respect to the subject of confidential employees. In conference, the House receded from its version of § 2(11). And Senator Taft thus was able to assure the Senate: "We did not accept any of [the House] provisions" that would have excluded other than genuinely supervisory employees (p. 21 *supra*).

Thus, the evolution of the statutory words confirms their plain meaning—the LMRA does not expressly or by fair implication embody a decision by Congress to exclude confidential employees from the NLRA, as amended. There is no warrant here for the Court to rewrite the Act that Congress wrote.

E. Bell Aerospace and Its Implications

The court below decided that it was required by this Court's decision in *Bell Aerospace* to rewrite the Act. As

we proceed to show, however, the holding of *Bell Aerospace* —that "managerial employees" are excluded from the Act —is entirely consistent with the legislative history set forth above. Much of the reasoning of *Bell Aerospace* is likewise consistent with that history. And while there is dictum in *Bell Aerospace* which admittedly is inconsistent with our analysis of that history, that dictum was not necessary to the Court's decision, does not, in fact, accurately reflect the legislative history, and should not be followed here.

1. *Bell Aerospace's* holding rests on the proposition that in enacting an exclusion for foremen, Congress intended to draw the dividing line between management and workers and to exclude from collective bargaining not just foremen but all employees "higher in the managerial structure" as well. 416 U.S. at 283. The legislative history of § 2(11) abundantly supports that proposition. The proponents of an exemption for supervisors made clear that this was their intent during the consideration of the Case bill:

> Unless the line is drawn by law at the point between actual production workers and lowest rank of actual management, where is the line to be drawn? Is the level of those subject to organization to be raised by successive stages until all employees of a company, including the president and other officers, are in the production union.... [P. 11 *supra.*]

The Senate Committee was even clearer in this regard in reporting the Taft bill, in 1947, explaining that § 2(11) would "draw[] a more definite line between management and labor" and explaining that *Packard Motor* "means, as Mr. Justice Douglas pointed out in his dissenting opinion—and as Board counsel conceded in argument—that unless Congress amends the act in this respect its processes can be used to unionize even vice presidents since they are not specifically exempted from the category of 'employees'." (p. 17 *supra.*) And, perhaps most significantly, both the House Managers, in reporting on the conference to the House, and Senator Taft, in reporting on the conference to the Senate, explained the Senate amendment, which the

confined the definition of 'supervisor' to individuals generally regard as foremen and *persons of like or higher rank*" (p. 21 *supra*). In *Bell Aerospace* the Court understood this legislative history as we do. *See* 416 U.S. at 281-282.

While Congress intended, in enacting § 2(11), to exclude employees "higher" in the managerial structure than foremen, there is no evidence that Congress likewise intended § 2(11) to exclude confidential employees. Confidential employees—secretaries, typists, clerks, telephone operators, salesmen, engineers and the like—were not, indeed, could not fairly be, considered to be "higher" than foremen in the managerial structure. Thus, the reasoning of *Bell Aerospace* does not require an exclusion for confidential employees.

2. In dictum, the *Bell Aerospace* Court suggested that, independent of the effect of § 2(11), Congress, in 1947, believed that confidential employees had been excluded from the Wagner Act by NLRB decisions, and that Congress intended to freeze that interpretation of the Wagner Act into the law. 416 U.S. at 283-284. The court below based its decision entirely on that portion of *Bell Aerospace*. But that aspect of the opinion—which was not necessary to the decision in *Bell Aerospace*—cannot be squared with the legislative materials and should not be followed here.

The *Bell Aerospace* dictum is based exclusively on the House Managers' statement—the substance of which was repeated verbatim in Senator Taft's written description for the Senate—explaining the Conference Committee's decision *not* to legislate with respect to confidential employees. The statement first noted that the House bill had defined "supervisor" to include:

> (A) certain personnel who fix the amount of wages earned by other employees, such as inspectors, checkers, weighmasters, and time-duty personnel; (B) labor relations personnel, police and claims personnel, and (C) confidential employees. [Leg. Hist. at 539, 1537.]

The statement then noted that the Senate amendment—which "confined the definition of 'supervisor' to individuals generally regarded as foremen and persons of like or higher rank" *(ibid)*—had been accepted by the Conference Committee. The statement concuded:

> In the case of persons working in the labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. [Leg. Hist. at 539-40, 1537]

In *Bell Aerospace* the Court read this statement to mean that (a) Congress "clearly thought that the Act did not cover 'confidential employees' even under a broad definition of that term," 416 U.S. at 283-84 n. 12; and (b) Congress intended to "impliedly exclude[ ]" such persons, *id.* at 283. As we proceed to show, each of these conclusions is in error.

(a) The quoted language does not support the inference that the House Managers or Senator Taft completely misunderstood long-settled Board law and thought that *all* confidential employees had been excluded from the Act. The most natural interpretation of these words is that the House Managers and Senator Taft meant that employees involved in labor relations, personnel and employment functions, *and confidential secretaries to such person,*[19] were excluded from the Act's benefits. This is, after all, in essence where

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[19] The use of the phrase "confidential *secretaries*" could not have been inadvertent, since just a few sentences earlier the statement described the House bill as having excluded "confidential *employees*" generally.

the Board law as of 1947 stood.[20] And there is no reason to assume that after the lengthy evolution of the LMRA, the House Managers and Senator Taft were still so hopelessly confused about the state of Board law as to believe that—notwithstanding a long and unbroken set of Board decisions extending back at least to 1939—all confidential secretaries (or all confidential employees) were treated by the NLRB as outside the Act.[21]

Thus, even if the statement by the House Managers and Senator Taft supported the conclusion that Congress intended to freeze its understanding of NLRB decisions into the NLRA—and we show below that it does not—the most that can be fairly said is that Congress intended to impliedly exclude those working in labor relations, personnel

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[20] To be sure, the Board had not held that persons whom it defined as "confidential employees" (i.e., those with access to confidential, labor relations information or, under *Ford Motor*, those "who assist and act in a confidential capacity to persons who exercise 'managerial functions in the field of labor relations'") were without any protection under the Wagner Act. But the Board had held that these employees were "depriv[ed] of their right to collective bargaining" (p. 5, *supra*). *i.e.* were excluded from the Act for purposes of collective bargaining. Thus the Managers' statement, while somewhat imprecise, constitutes a fair shorthand description of the state of the law in 1947. Indeed, the Board itself had used similar shorthand, asserting that confidential employees, as the Board defined that term, were "outside the protection of the Act," *General Motors Corp.*, 53 NLRB 1096 (1943); *see also Armour & Co.*, 49 NLRB 688, 690 (1943); *Armour & Co.*, 54 NLRB 1462, 1465 (1944).

[21] In suggesting otherwise in *Bell Aerospace*, the Court was apparently unaware of the history of NLRB decisions with respect to confidential employees. (The briefs in *Bell Aerospace* had not focused on that issue.) Thus the Court in *Bell Aerospace* semed to view *Ford Motor Co.* as having worked a fundamental change in preexisting law, see 416 U.S. at 283-84 n. 12, whereas in fact that decision simply refined long-standing Board precedent (see pp. 4-7, *supra*).

and employment departments and confidential secretaries *to such persons.*

(b) More fundamentally, the statements by the House Managers and Senator Taft do not indicate that Congress intended to freeze the Board's decisions, as Congress understood them, into place, thereby precluding further developments in this area in the light of experience. In enacting the LMRA Congress understood well the difference between legislating and not legislating. Congress chose to amend the definition of "employee" to exclude "supervisors" precisely because Congress was not content to leave this matter to the Board's discretion, notwithstanding the argument of the opponents of the change that the subject was best left for the NLRB to resolve on a case-by-case basis (pp. 8-9 *supra*). Similarly, the House Committee had proposed an express exclusion for confidential employees because "protecting confidential financial information . . . protecting secret processes and experiments . . . and protecting other vital secrets *ought not to rest in the administrative discretion of the Board*" (p. 16 *supra*). But the House was unable to persuade the Senate to accept the House version of § 2(11), and thus the matter of confidential employees was left where it had been: "in the administrative discretion of the Board."

Nothing in the House Managers' statement, which Senator Taft echoed, is to the contrary. The Managers, after explaining how the Board treated "persons working in the labor relations, personnel and employment departments" and "confidential secretaries" simply stated that "*presumably* [the NLRB] will continue to treat such persons as outside the scope of the Act," and that "it was not the intention of the conferees to alter this practice [of the NLRB] in any respect." Certainly that is a measured expression of approval of Board practice. But the Managers did not state that the Board would be *required* to treat any confidential employee as outside the NLRA. Indeed, the use of the word "presumably" indicates that they were not

issuing an instruction as to how the NLRB must proceed in the future.

Any other reading of the House Managers-Senator Taft statement would be inconsistent with the legislative history as a whole. There is nothing in the legislative history to suggest that the Senate favored excluding confidential employees; indeed, every indication is to the contrary. The Senate was constantly reassured that § 2(11) was a narrow provision which dealt only with foremen, and with higher ranking managers, but not with "any of the others about whom controversy has arisen" (p. 18 *supra*). Yet the *Bell Aerospace* dictum reads the words of the House Managers, *explaining why legislation was not being enacted,* to have worked a fundamental change in the Wagner Act—even though the Senate never voted for such a change.

The proper reading of the legislative history then is that Congress in 1947 did not disturb at all the Board law with respect to confidential employees. And even if we are wrong in this view, the most that can be said is that Congress in 1947 intended to freeze the then existing law, under which employees with access to secret information were not considered outside the Act (or even outside of an otherwise appropriate bargaining unit) unless the employee had access to confidential *labor relations* information. In either event, the decisions below are erroneous and should be reversed.

• • •

The sum of the matter is this: we fully accept the basic holding of *Bell Aerospace* with regard to managerial employees; it states a logical implication from Congress' express exclusion of "supervisors" because the latter were understood by Congress to be at a lower level of the managerial hierarchy. Nor do we at all question the approach to statutory construction in *Bell Aerospace*—that Congress can legislate by freezing what Congress understands to be administrative practice into law and to that extent curtail-

ing future administrative discretion. *See* 416 U.S. at 289. Our disagreement is only with the suggestion in *Bell Aerospace* that Congress fundamentally misunderstood the law concerning confidential employees in 1947 and the further suggestion that Congress intended to codify its misunderstanding of that law. As we have shown, those suggestions do not square with the governing legislative materials.

In *Bell Aerospace* the Court was not confronted with the question of the rights of employees who are not in the managerial hierarchy. The *Bell Aerospace* "*dicta* is therefore not controlling now that 'the very point is presented for decision'. *Cohens* v. *Virginia*, 6 Wheat. 264, 399". *Third National Bank* v. *Impac Limited, Inc.*, 432 U.S. 312, 319 (1977). "[B]eing squarely presented with the issue [of the status of confidential employees] in this case [the Court should] recede from the implications of the *dicta* in" *Bell. NLRB* v. *Boeing Co.*, 412 U.S. 67, 72 (1937). See also *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, No. 79-1944, Slip. Op. p. 5, n.3, (May 18, 1981).

CONCLUSION

For the foregoing reasons, the decisions below should be reversed.

Respectfully submitted,

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APPENDIX

In the 61 pre-1947 decisions listed below, the National Labor Relations Board followed the principles concerning employees with access to confidential information set forth at pp. 4-7 of the Brief:

Brooklyn Daily Eagle, 13 NLRB 974 (1939)
Bull Dog Electric Products Co., 22 NLRB 1043 (1940)
Western Union Telegraph Co., 30 NLRB 679 (1941)
National Fireworks, Inc., 33 NLRB 1115 (1941)
Creamery Package Manufacturing Co., 34 NLRB 106 (1941)
Warner Brothers Pictures, Inc., 35 NLRB 744 (1941)
Western Union Telegraph Co., 36 NLRB 1066 (1941)
Chrysler Corp., 36 NLRB 157 (1941)
General Motors Corp., 37 NLRB 441 (1941)
Montgomery Ward & Co., 38 NLRB 297 (1942)
Chrysler Detroit Co., 38 NLRB 313 (1942)
Cincinnati Times-Star Co., 39 NLRB 39 (1942)
Poultrymen's Service Corp., 41 NLRB 444 (1942)
Polish National Alliance, 42 NLRB 1374 (1942)
Bendix Products Division, 43 NLRB 912 (1942)
Paramount Pictures, Inc., 45 NLRB 116 (1942)
Murray Corp., 45 NLRB 854 (1942)
Puget Sound Bridge & Dredging Co., 46 NLRB 1071 (1943)
Bohn Aluminum & Brass Corp., 47 NLRB 1229 (1943)
Armour & Co., 49 NLRB 688 (1943)
Bethlehem-Sparrows Point Shipyard Inc., 49 NLRB 762 (1943)
Maryland Drydock Co., 50 NLRB 363 (1943)
Firestone Tire & Rubber Co., 50 NLRB 679 (1943)
Boston Edison Co., 52 NLRB 118 (1943)
Republic Steel Corp., 51 NLRB 1228 (1943)
St. Johns River Shipbuilding Co., 52 NLRB 12 (1943)
General Motors Corp., 52 NLRB 649 (1943)
Babcock & Wilcox Co., 52 NLRB 900 (1943)
Potash Co., 53 NLRB 441 (1943)
General Motors Corp., 53 NLRB 1094 (1943)
New York Telephone Co., 53 NLRB 307 (1943)
Coolerator Co., 53 NLRB 461 (1943)
Colonial Branch Co., 53 NLRB 846 (1943)
U.S. Smelting, Refining & Mining Co., 53 NLRB 84 (1943)

Republic Aviation Corp., 54 NLRB 539 (1944)
Consolidated Vultee Aircraft Corp., 54 NLRB 103 (1943)
Armour & Co., 54 NLRB 1462 (1944)
General Cable Corp., 55 NLRB 1143 (1944)
West Penn Power Co., 55 NLRB 1356 (1944)
Hoover Co., 55 NLRB 1321 (1944)
Spicer Manufacturing Co., 55 NLRB 1491 (1944)
Bell Aircraft Corp., 56 NLRB 1356 (1944)
General Motors Corp., 56 NLRB 1547 (1944)
Utah Copper Co., 57 NLRB 308 (1944)
Electric Boat Co., 57 NLRB 1348 (1944)
Chrysler Corp., 58 NLRB 235 (1944)
American Steel & Wire Co., 58 NLRB 253 (1944)
U.S. Automatic Corp., 58 NLRB 662 (1944)
Houdaille-Hershey Corp., 59 NLRB 1292 (1944)
South Bend Lathe Works, 59 NLRB 562 (1944)
Aluminum Co. of America, 60 NLRB 338 (1945)
Consolidated Vultee Aircraft Corp., 60 NLRB 525 (1945)
Pacific Gas & Electric Co., 61 NLRB 564 (1945)
Magnolia Pipe Line Co., 61 NLRB 723 (1945)
Continental Steel Corp., 61 NLRB 97 (1945)
American Smelting and Refining Co., 61 NLRB 506 (1945)
Bethlehem Steel Co., 63 NLRB 1230 (1945)
Ford Motor Co., 66 NLRB 1317 (1946)
St. Louis Independent Packing Co., 67 NLRB 543 (1946)
Tennessee Gas & Transmission Co., 67 NLRB 1375 (1946)
Browne & Sharpe Manufacturing Co., 68 NLRB 487 (1946)

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

This brief amicus curiae is filed with the written consent of the parties. The letters giving consent have been separately filed with the Court.

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is a federation consisting of more than 4,000 state and local chambers of commerce and trade and professional associations as well as more than 96,000 business firms and individuals who maintain direct membership. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters before the courts, the United States Congress, the Executive Branch and the independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance its members' interests in a wide spectrum of labor relations litigation.

The issue before the Court in this case—that of the proper definition of confidential employee status under the National Labor Relations Act—is of major importance to Chamber members. The court below held that employees with access either to their employer's confidential labor relations information or to any other information that their employer considers confidential must be excluded from the coverage of the Act. The Chamber thinks that the court below correctly refused to accept the Labor Board's decision that the employee in question was covered by the Act. However, we are concerned that the court too readily moved from a rejection of the Board's narrow definition of confidential labor relations employees to the framing of a decision on non-labor grounds, without first redefining confidential labor relations employee status. For the reasons explained in this brief, we suggest that the court below should have held, as it did, that the Labor Board's definition of confidential labor relations employees is inadequate, but should have remanded the case to the Board with instructions to reassess the facts of this case under the proper labor relations definition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The brief filed on behalf of the National Labor Relations Board summarizes the Board's position as follows:

> The Board's present policy with respect to "confidential employees" is consistent with more than 40

> years of administrative and judicial practice, and with the legislative history of the Taft-Hartley amendments. [Brief at 14.]

That is hardly the case.

The Board's current policy is to exclude, in addition to managerial and supervisory employees, the confidential assistants to a company's labor relations manager and virtually no one else. Even to those confidential assistants the Board extends the right to strike and to participate in all other forms of concerted activity except collective bargaining.

This policy is at odds with the Board's decisional history up to 1946. During that early period, it excluded employees elsewhere in the company whose jobs required them to learn all or part of their employer's confidential labor relations information. The policy is also at odds with the congressional understanding in 1947 that the Board was treating "persons working in the labor relations, personnel and employment departments" and "confidential secretaries" as "outside the scope of the act," and the congressional "presumption" that the Board "will continue" to do so.[1] The policy as applied in particular cases has been described by one court of appeals as "incredibl[e]," and by another court of appeals as "patently unfair."[2] In short, the policy is not consistent with the Board's early decisional history and the congressional understanding, and needs to be made so.

The Board's early policy recognized, as its current one does not, that there is a direct and substantial conflict between an adversarial labor relations relationship and the possession of confidential managerial labor relations

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[1] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947).

[2] *NLRB* v. *Allied Products Corp.*, 548 F.2d 644, 649 (6th Cir. 1977); *NLRB* v. *Quaker City Life Insurance Co.*, 319 F.2d 690, 694 (4th Cir. 1963).

information by an employee who is an adversary in that relationship. Management is severely handicapped if the nonsupervisory employees who know its labor confidences are subject to a divided loyalty. Yet the current rule of the National Labor Relations Board, in defiance of its own early history and the intent of Congress, mandates exactly such a divided loyalty in most instances.

The Labor Board, in its brief to this Court, seeks to obscure the absurdity of the Board's present rule on confidential labor relations employees by emphasizing the unfairness of a rule that would exempt from bargaining employees with access to confidential information unrelated to labor relations. The purpose of this brief is to refocus for the Court the lack of fairness inherent in the Board's present rule and to suggest that the Board has subverted the intent of Congress in its treatment of confidential labor relations employees.

ARGUMENT

The Board's current attitude toward confidential labor relations employees has its origins in the Board's vacillation and contradictory treatment concerning the status of supervisors before 1947. The Board's early ruling that supervisors were precluded by conflict of interest from bargaining collectively against their employer was accompanied by a similar ruling with respect to employees with access to their employer's confidential labor relations information. Shortly after the Board reversed its position on supervisors, it changed its position on confidential labor relations employees in a way that emphasized employee rights at the expense of conflict of interest concerns. Accordingly, it is necessary to begin an analysis of the confidential employee issue with a discussion of the supervisory issue.

In *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 492 (1947), this Court said:

> If we were obliged to depend upon administrative interpretation for light in finding the meaning of the statute, the inconsistency of the Board's decisions would leave us in the dark. But there are difficult questions of policy involved in these cases which, together with changes in Board membership, account for the contradictory views that characterize their history in the Board. [Footnote omitted.]

Packard, of course, involved the question whether it was consistent with national labor policy as articulated by Congress to place supervisors, who represent management, in an adversarial role against management by according them collective bargaining rights. This Court's holding that Congress had given the Board the discretion to extend such rights to supervisors caused Congress to clarify its intent in the Labor Management Relations Act of 1947 by excluding supervisors from the coverage of the National Labor Relations Act. Congress did so, in part, because it felt that management was entitled to undivided loyalty within its own ranks. The House Report said:

> The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its "expertness," changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust. [Emphasis in original.]

H.R. Rep. No. 245, 80th Cong., 1st Sess., 17 (1947).

Some years later, the failure of the Board to adhere to the intent of the 1947 Act caused this Court in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), to remind the Board that it was not free to ignore the congressional purpose by using an omission in statutory wording to

give collective bargaining rights to managerial employees other than supervisors. This Court told the Board in *Bell Aerospace* that since the congressional purpose was clear, the Board could not manufacture a grant of administrative discretion out of the congressional preoccupation with supervisors and the consequent failure expressly to exempt other mangerial employees.

All of these themes, with some differences in detail, are present in the instant cases. The history of the Board's decisions is characterized by inconsistency, although here Congress was not aware that the Board had made a basic change in its position while the 1947 Act was under consideration. The policy issue is the same, that of loyalty in the performance of a management function, although here the persons involved are employees who assist management rather than the members of management itself. The congressional intent from 1947 that such persons not have collective bargaining rights is clear. And this Court is again called upon to remind the Board that omissions in statutory wording are not a license to ignore the congressional purpose.

From *Brooklyn Daily Eagle*, 13 N.L.R.B. 974 (1939), to *Bethlehem Steel Co.*, 63 N.L.R.B. 1230 (1945), the Board decided 57 cases [3] in which it consistently developed the doctrine that it would be incompatible with their duties for employees whose assignments involve access to their employer's confidential labor relations information to have an adversarial collective bargaining relationship with their employer. By 1944, the Board was disposing of such cases by referring to a well-established history.

In *Hoover Co.*, 55 N.L.R.B. 1321 (1944), the Board was asked to permit a bargaining unit consisting of 33 "hourly paid stenographers and clerical workers in the

[3] The AFL-CIO has listed all of the cases in an appendix to its amicus brief.

foremen's, general foremen's, and superintendents' offices." *Id.* at 1322. These employees, many of whom were in pools, prepared "reports dealing with confidential instructions regarding employees' overtime allowances, earning adjustments, rate change requests, etc." and worked with "correspondence between members of management and the supervisory groups herein, and confidential memoranda and reports arising from the investigation of grievances or pertaining to other labor relations matters." *Id.* at 1322-23. In denying the request for bargaining, the Board said:

> We have previously expressed our awareness of the fact that in negotiating and in the settlement of grievances, the interests of a union and the management are ordinarily adverse. Consequently, we have adhered to the opinion that the management should not be required to handle labor relations matters through employees who are represented by the union with which the Company is required to deal and who in the normal performance of their duties may obtain advance information of the Company's position with regard to contract negotiations, the disposition of grievances, or other labor relations matters. Since the unit here sought is confined solely to employees of the aforementioned confidential type, we are of the opinion that the unit is inappropriate for the purposes of collective bargaining and, accordingly, that no question has arisen concerning the representation of employees of the Company in an appropriate bargaining unit. [*Id.* at 1323, footnote omitted.]

Although the Board in *Hoover* theoretically left open the possibility that confidential labor relations employees could be represented by a union which represented no other employees of the employer, the Board appeared to close that door as well in *Electric Boat Co.*, 57 N.L.R.B. 1348 (1944). The Board there spoke categorically:

> In short, the shop clerks in the course of their duties acquire such confidential knowledge of labor relations matters as would warrant their exclusion from any bargaining unit otherwise found to be appropriate and, equally, render inappropriate any unit composed solely of such employees. [*Id.* at 1349, footnote omitted.]

While it was developing its doctrine on confidential labor relations employees, the Board also was taking the position that supervisors were not entitled to collective bargaining rights. *Maryland Drydock Co.*, 49 N.L.R.B. 733 (1943); *Boeing Aircraft Co.*, 51 N.L.R.B. 67 (1943). The Board first reversed its position on supervisors in *Packard Motor Car Co.*, 61 N.L.R.B. 4, 64 N.L.R.B. 1212 (1945), with the results previously noted. Then in 1946, the Board made a basic change in its doctrine on the exclusion of confidential labor relations employees.

In *Ford Motor Co.*, 66 N.L.R.B. 1317 (1946), the Board decided that employees who work with confidential labor relations information should not be excluded from bargaining unless they also function in a "confidential capacity" to a labor relations manager who is charged with "formulating, determining and effectuating" the employer's labor policies. *Id.* at 1322. The Board explained that this new definition of a confidential labor relations employee would allow bargaining by employees who "merely supply" confidential information to a labor relations manager, because such employees would not be assisting management in the use of such information. The definition also would obviously allow bargaining by employees who merely assist in formulating, *or* determining, *or* effectuating labor policy, but do not assist in all three categories. *Id.* Thus most, if not all, of the employees excluded in cases like *Hoover* would now be allowed to bargain against their employer.

The Board's only explanation for this result was that the old definition was "needlessly preclud[ing] many employees from bargaining collectively together with other

workers having common interests." *Ford* at 1322. The sole emphasis in *Ford* was on employee rights, and there was no attempt to explain how the needs of the employer as recognized in the *Hoover* decision could be accommodated within the new definition.

The *Ford* approach was followed in three other cases the same year, *St. Louis Independent Packing Co.*, 67 N.L.R.B. 543 (1946), *Tennessee Gas & Transmission Co.*, 67 N.L.R.B. 1375 (1946), and *Browne & Sharpe Manufacturing Co.*, 68 N.L.R.B. 487 (1946).[4] Unlike *Packard*, these cases were not appealed and apparently escaped the notice of Congress. Although the House in 1947 legislated an exclusion for confidential labor relations employees as part of a definition expanding the exclusion of confidential employees beyond the labor relations nexus to cover employees with access to trade secrets, the Senate did not agree to such an expanded definition. The final bill contained a statutory definition of "supervisor" to reverse the *Packard* case, but the House and Senate conferees explained that it was unnecessary to write a definition for confidential labor relations employees since the Board was already treating "persons working in the labor relations, personnel and employment departments" as "outside the scope of the act" and "presumably will continue" to do so. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947). The Conference Report said:

> As heretofore stated, both the House bill and the Senate amendment excluded supervisors from the individuals who are to be considered employees for the purposes of the act. The House bill defined as "supervisors", however, certain categories of employees who were not treated as supervisors under the Senate amendment. These were generally (A) certain personnel who fix the amount of wages earned by other employees, such as inspectors, check-

[4] This listing of cases is drawn from the appendix to the AFL-CIO's amicus brief.

ers, weighmasters, and time-study personnel, (B) labor relations personnel, police, and claims personnel, and (C) confidential employees. The Senate amendment confined the definition of "supervisor" to individuals generally regarded as foremen and persons of like or higher rank.

The conference agreement, in the definition of "supervisor," limits such term to those individuals treated as supervisors under the Senate amendment. In the case of persons working in the labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. [*Id.*]

The Conference Report is consistent with the Board's *Hoover* decision, but not with the Board's *Ford* decision. The congressional reference to the exclusion of nonsupervisory employees in the labor relations, personnel, and employment departments focuses on persons who work with confidential labor relations information, without requiring that they also function in a confidential capacity to a labor relations manager. Indeed, the Conference Report goes on to refer to a second group of employees called "confidential secretaries," who obviously have a relationship to management that the first group does not.

After passage of the 1947 Act, the Board followed its *Ford* decision until 1952. It then decided at least three cases in which it classified employees as confidential based on their access to labor relations information rather than their role in developing and implementing policy. These three cases were overruled in 1956 in *B. F. Goodrich Co.*, 115 N.L.R.B. 722 (1956), in which

the Board reviewed and restated the *Ford* doctrine, as follows:

> Since the early *Ford Motor Company* case, in which definitions theretofore accorded the term "confidential employees" were reexamined, the Board has consistently excluded from bargaining units as confidential employees persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. Although announcing its intention in the *Ford Motor Company* case to limit the term "confidential" so as to embrace only such employees, the Board has, from time to time since that decision, expanded its view as to what constitutes a confidential employee by designating as "confidential," for example, secretaries to persons involved in the handling of grievances[5] and cashiers having access to labor relations policy data.[6] Upon further reexamination of our holdings in the instant connection, we are still of the opinion expressed in the *Ford Motor Company* case that any broadening of the definition of the term "confidential" as adopted in that decision needlessly precludes employees from bargaining collectively together with other employees sharing common interests. Consequently, it is our intention herein and in future cases to adhere strictly to that definition and thus to limit the term "confidential" so as to embrace only those employees who assist and act in a confidential capacity to persons who formulate, determine, *and* effectuate management policies in the field of labor relations.[7]

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[5] *International Smelting & Refining Co. (Raritan Copper Works)*, Case No. 4-RC-2143 (not reported in printed volumes of Board Decisions and Orders), upon which the Employer relies herein, is one such case.

[6] *Bond Stores, Incorporated*, 99 NLRB 1029.

[7] To the extent that *Minneapolis-Honeywell Regulator Co.*, 107 NLRB 1191, relied upon by the Employer, and the cases cited in footnotes 5 and 6 and other cases are inconsistent with the views expressed herein, they are hereby overruled.

Id. at 724 (emphasis in original, footnote 4 omitted).

The *Ford-B. F. Goodrich* doctrine has led to a number of absurd results. For example, in *Westinghouse Electric Corp.*, 138 N.L.R.B. 778 (1962), the Board included in the bargaining unit two industrial relations assistants who administered the employer's procedures for hiring, upgrading, downgrading and recalling employees. *Id.* at 780. They interviewed applicants, gave tests, graded them according to company standards and referred the applicants to supervisors for hire. *Id.* They interviewed employees for upgrading, and processed and explained the "bumping" rights to employees in reduction in force situations. *Id.* at 781. Despite this extensive involvement in personnel matters, the assistants were included in the unit, both even becoming the equivalent of shop stewards for the union. *Id.* at 780.

In *Hudson Waterways Corp.*, 193 N.L.R.B. 378 (1971), the Board addressed the issue of whether "ships paymasters" are confidential employees. These persons worked directly under the chief paymaster in jobs that are similar to those performed in employment, personnel or labor relations departments, but tailored to the particular needs of the shipping industry. At the time a ship neared port, the paymaster first studied the ship master's payroll and determined potential areas of dispute, which he then discussed with the chief paymaster for direction on dispute settlement based in part on the pertinent bargaining agreement. He next compiled the payroll sheets and notified the union agents, shipping commissioner and local port authority about the payoff so they could attend. On board ship he audited the master's payroll, and attempted to settle disputes with the master based on the bargaining contract. Some of the more difficult disputes were passed back to the chief paymaster for settlement. The paymasters were even consulted by management officials for their opinions on developing future bargaining positions. Despite this active involvement in labor matters in a position where the paymaster

often represented the employer vis-a-vis the employees or the unions, they were included with the rank and file employees in the bargaining units.

Again, in *California Inspection Rating Bureau*, 215 N.L.R.B. 780 (1974), the Board included in the bargaining unit two accounting clerks even though they had access to "personnel files and confidential material of all Bureau employees and assist in preparing the information regarding advice on personnel matters", "assist in preparing budget estimates for personnel items", and "frequently have knowledge of various personnel decisions made by the Bureau before the employees affected by those decisions are made aware of the action by their supervisors." *Id.* at 783. The Board included them in the unit on the ground that they did not act in a confidential capacity to one who formulates, determines and effectuates management labor policies. *Id.* Nonetheless, they were active in the employer's labor matters and were privy to confidential labor information.

Since the *B. F. Goodrich* decision in 1956, the Board has consistently refused to exclude employees on the basis of the confidentiality of the labor relations information with which they work. See, for example, *Goldblatt Bros., Inc.*, 118 N.L.R.B. 643 (1957) (assistant to store's personnel supervisor and two assistants to the paymaster included even though they had access to confidential personnel and payroll records). The Board usually includes these employees without ever determining whether the personnel files to which they have access are confidential. See *San Diego Transit Corp.*, 182 N.L.R.B. 428 (1970) (includes secretary to controller and secretary to safety and personnel directors, both of whom had access to employees' personnel records); *Locomotive Firemen & Enginemen*, 145 N.L.R.B. 1521 (1964) (includes assistant chief clerk who had access to personnel files).

The Board has even included in bargaining units secretaries who work for plant or branch managers in charge of all the day-to-day operations of their employees, usually on the ground that these managers are not involved in labor, personnel or employment matters because they receive headquarters guidance. Chairman Miller refused to concur in these decisions, finding instead that

> the fact that the manager is the Employer's principal representative and agent at the branch office necessarily involves him in the day-to-day formulation, determination, and effectuation of labor relations policy at the office, both in creating solutions to difficulties that may suddenly arise and in applying to the particular operations and problems of his branch labor policies established in broad outline at the home office.

Empire Mutual Insurance Co., 195 N.L.R.B. 284, 286 n.8 (1972) (Miller, Chairman, dissenting). See also *Holly Sugar Corp.*, 193 N.L.R.B. 1024, 1026-27 (1971) (Miller, Chairman, dissenting). Recently, the Board also refused to exclude secretaries who type merit evaluations and other personnel documents on the ground that the "record does not demonstrate . . . that these secretaries have input into the substantive creation of documents relating to merit evaluations, disciplinary actions, or related activities." *United States Postal Service*, 232 N.L.R.B. 556, 558 (1978).

Finally, the Board qualifies its confidential employee exclusion with a series of conditions that have no analytical relation either to the confidentiality of the subject matter or to the work done by the employee in question. The fact that an employee assists in grievance proceedings is insufficent in the Board's view for exclusion. *Curtiss-Wright Corp.*, 101 N.L.R.B. No. 1, 31 L.R.R.M. 1005 (1952). If the employee's superior is only involved

in labor matters from an advisory standpoint, *Eastern Corp.*, 116 N.L.R.B. 329, 333 (1956), or only on a departmental rather than plant or company-wide basis, *Ethyl Corp.*, 118 N.L.R.B. 1369, 1371 (1957), the employee will not be deemed confidential. As previously mentioned, on-site employees are not considered confidential even when they negotiate payroll disputes directly with union representatives. *Hudson Waterways Corp.*, 193 N.L.R.B. 378 (1971).

Most of the appellate decisions reviewing the Board's *Ford-B. F. Goodrich* doctrine have accepted the Board's confidential employee definition without critical analysis,[5] although several of them have bridled at the Board's results.[6] The reaction of the Fourth Circuit in *NLRB* v. *Quaker City Life Insurance Co.*, 319 F.2d 690 (4th Cir. 1963), is illustrative. Without questioning whether the Board has discretion to fashion its own confidential employee definition, the court held that the Board had "exceeded the bounds of proper discretion" on the facts of the case before it by refusing to exclude the branch office clerk. *Id.* at 694. The court went on to explain:

> The undisputed evidence indicates that this employee is privy to confidential communications con-

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[5] Of the cases cited in the Board's brief at pages 31-32 and note 37, none addresses the legislative history of the 1947 Act or the difference between the Board's *Hoover* rule and its *Ford-B. F. Goodrich* rule. In one of those cases, *NLRB* v. *California Inspection Rating Bureau*, 591 F.2d 56 (9th Cir. 1979), the issue of confidential employee status was neither presented to nor considered by the court.

[6] In addition, to the Seventh Circuit decisions under review here, and *NLRB* v. *Quaker City Life Insurance Co.* (discussed in the text immediately following this note), see *NLRB* v. *Allied Products Corp.*, 548 F.2d 644, 649 (6th Cir. 1977) (the court found the Board's refusal to exclude the personal secretary to the general manager of the plant, who was also the company's labor relations administrator at the plant, to be "incredibl[e]").

> cerning labor relations between the insurance agents and the employer. She is intimately aware of all communications between the District Manager and the home office concerning recommended wage and expense allowance adjustments, personal attitudes of the agents, the agents' performance, and remedial action connected therewith, and recommendations on employment termination.
>
> It would be patently unfair to require the company to bargain with a union that contains such an employee. [*Id.*].

The results in many of the Board's confidential employee decisions are so patently unworkable that it is difficult to believe Congress in 1947 could have approved them, even without the legislative history showing that Congress intended to have the Board exclude all confidential labor relations employees. As the Board itself said in *Maryland Drydock Co.*, 49 N.L.R.B. 733, 738 (1943):

> While the maxim *inclusio unius est exclusio alterius* is a well-established canon of statutory construction, the courts have recognized its limitation, where its application leads to results so absurd as to make it unreasonable to believe that they were intended by Congress. [Footnote omitted.]

The Board's treatment of confidential employees is another illustration of the limits of the maxim.

Even where the Board has found employees to be confidential under the *Ford-B. F. Goodrich* doctrine, it has insisted that they are entitled to engage in all aspects of union activity except bargaining with other employees. In *Peavey Co.*, 249 N.L.R.B. 853 n.3 (1980), the Board recently reiterated this position, citing for support two cases in which the courts of appeals had disagreed with the Board:

> Confidentials have a much different status [than supervisors] in that employers are not entitled to

restrict their protected activities. Thus, whether or not Respondent honestly viewed Snider as a confidential employee is of no moment here since Snider was entitled to engage in such activities even if she were a confidential. *Wheeling Electric Company*, 182 NLRB 218 (1970), enforcement denied 444 F.2d 783 (4th Cir. 1971); *Peerless of America, Incorporated*, 198 NLRB 982 (1972), enforcement denied in relevant part 484 F.2d 1108 (7th Cir. 1973). See also *Los Angeles New Hospital*, 244 NLRB No. 157, fn.4 (1979).[7]

The Board's position is again illogical. The problem of divided loyalty is not solved by a rule saying that confidential employees may not participate in bargaining but may participate in strikes and grievances. Moreover, the Board's position again ignores the congressional intent. The Conference Report to the 1947 Act expressed the understanding that "the Board has treated, and presumably will continue to treat, such persons as *outside the scope of the act.*" H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947) (emphasis added). As the Fourth Circuit said in *NLRB* v. *Wheeling Electric Co.*, 444 F.2d 783, 786 (4th Cir. 1971):

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[7] Strangely enough, the Seventh Circuit has just enforced this portion of the Board's order without explanation. *Peavey Co.* v. *NLRB*, —— F.2d ——, 107 L.R.R.M. 2359, 2361 (7th Cir. 1981). There is probable cause to believe that this was an oversight on the part of the Seventh Circuit since Circuit Judge Sprecher, who wrote both of the *Hendricks* decisions presently before this Court, also participated without dissent in the *Peavey* decision. In both *Hendricks* decisions, the Seventh Circuit held that confidential employees must be excluded from the National Labor Relations Act entirely, *Hendricks County Rural Electric Membership Corp.* v. *NLRB*, 603 F.2d 25, 30 (7th Cir. 1979), 627 F.2d 766, 768 (7th Cir. 1980). Moreover, the Seventh Circuit had earlier reached the same conclusion that total exclusion was required in *Peerless of America, Inc.* v. *NLRB*, 484 F.2d 1108 (7th Cir. 1973), cited by the Board above.

> There is admittedly nothing in the amended Act which explicitly indicates that confidential employees are to be excluded from its coverage. But there is a congressionally expressed reason for that omission plus a clear expression of a legislative intention to exclude them from the Act. That is enough.[8]

It is unreasonable to believe that Congress intended any other result.

The Board may have been less than clear on this point before 1947. On the one hand, the Board persuaded the only court of appeals to address the question before 1947 that an employee excluded as a confidential secretary from bargaining with other employees was entitled to join them in a strike. *NLRB* v. *Poultrymen's Service Corp.*, 138 F.2d 204, 210 (3d Cir. 1943). On the other hand, the Board's language in its 1944 *Electric Boat* decision, quoted at pages 7-8 above, was so categorical about the exclusion of confidential employees from "any bargaining unit" that Congress may justifiably have concluded that other kinds of concerted activity with the bargaining unit would be out of the question. Given the legislative history of the 1947 Act, it is fair to say that if Congress had considered *Poultrymen's Service Corp.* to be the law, it would have been outraged, as it was with the Board's *Packard* decision on supervisors.

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[8] *Wheeling Electric* is the leading court of appeals decision on the right of concededly confidential employees to participate in union activities other than bargaining. The Fourth Circuit in *Wheeling* rejects the contrary decision of the Fifth Circuit in *NLRB* v. *Southern Greyhound Lines*, 426 F.2d 1299 (5th Cir. 1970), on the ground that the court there failed to consider the legislative history of the 1947 Act at all. The only other contrary court of appeals decisions after 1947 are an enforcement without opinion of the Fifth Circuit in *NLRB* v. *Service Technology Corp.*, 480 F.2d 923 (5th Cir. 1973), *cert. denied*, 415 U.S. 948 (1974) (which presumably relies upon *Southern Greyhound*), and the Seventh Circuit decision in *Peavey Co.* v. *NLRB* (discussed in footnote 7 above), neither of which mentions the 1947 Act.

CONCLUSION

The Board in the instant case found that the personal secretary to respondent's general manager and chief executive officer was protected by the National Labor Relations Act. The court below refused to enforce the Board's order because it concluded, after one unsatisfactory remand for additional findings, that it and the Board were in irreconcilable disagreement over the proper standard to be used in determining confidential status.

The source of that disagreement is that the Board's current rule defines confidential labor relations employees far too narrowly. The court below bridled at the result, as had the Fourth Circuit in *Quaker City Life Insurance Co.* and the Sixth Circuit in *Allied Products Corp.*, discussed at pages 15-16 above. Unlike those courts, which had simply rejected the Board's result without questioning the definition, the Seventh Circuit here questioned and rejected the definition itself. Rather than mandating a broader definition of confidential labor relations employees, however, the Seventh Circuit excluded the employee in question as confidential on non-labor grounds that may have been unnecessarily broad.[9]

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[9] *Compare* the Seventh Circuit's uncritical acceptance of the Board's finding that the general manager's personal secretary did not have access to confidential labor information *with* the Sixth Circuit's rejection of the Board's findings in *NLRB* v. *Allied Products Corp.*, 548 F.2d 644 (6th Cir. 1977), another case involving the personal secretary to a general manager. In that case, as in this one, there was no evidence of the precise information to which the secretary had access. The Sixth Circuit there said:

> Once an employer has demonstrated that a secretary prepares and reads labor relations materials, it need not provide a list of the particular documents that have flowed through the secretary's hands unless the charging party has at least introduced evidence which contests the general statement. [*Id.* at 649.]

It seems highly likely that the secretary here at least had access to work schedules and other information affecting the employees

It is time, we suggest, for this Court to determine the proper definition for confidential labor relations employees. We ask that this Court remand this case to the Board with instructions to reassess the facts under the proper standard.

That standard, we submit, is reflected in the Board's reasoning in *Hoover* and not in its reasoning in *Ford-B. F. Goodrich*. The essential differences between the two rules, as the Board has applied them, is that under the *Hoover* rule employees are excluded because of what their jobs require them to learn in confidence, whereas under the *Ford-B. F. Goodrich* rule employees are excluded only if they have a central role in the formulation, determination, *and* effectuation of policy.

The Board should be told to exclude employees who are privy to their employer's confidential labor relations information, in whole or in part. The Board should also be reminded that its factual definition of "labor relations" information in *Hoover* is as broad as the definitions of bargaining contained in Sections 8(d) and 9(a) of the National Labor Relations Act, 29 U.S.C. §§ 158 (d) and 159(a), and properly so; any information about

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before they had access to it, because she "typed all of [the general manager's] correspondence." *Hendricks County Rural Electric Membership Corp.*, 247 N.L.R.B. No. 68, 103 L.R.R.M. 1129, 1130 (1980). Moreover, the secretary here "share[d] a partitioned office with Dillon," the general manager. *Id.* It is hard to believe that she could share an office with the general manager and not be privy to confidential information affecting the employees.

The Board made much of the fact that "while she opened mail addressed to Respondent and Dillon, . . . she never saw copies of correspondence from Respondent's lawyers to the union . . . ." *Hendricks County Rural Electric Corp.*, 236 N.L.R.B. 1616, 1619 (1978). Aside from the fact that correspondence with the union would hardly be confidential from the employees, the rest of the mail that she opened must have contained, at the least, proposals, plans and decisions affecting the employees to which the latter did not then have access.

"wages, hours, and other terms and conditions of employment," to quote Section 8(d), is labor relations information, and is confidential if it has not been released to rank-and-file employees. Finally, the Board should be told that the exclusion of confidential labor relations employees from bargaining also precludes giving them concerted activity rights that are inconsistent with the exclusion.

Respectfully submitted,

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No. 80-885

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, *Respondent.*

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

MALLEABLE IRON RANGE COMPANY *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF ON BEHALF OF OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC, AS AMICUS CURIAE

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BRIEF ON BEHALF OF OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC, AS AMICUS CURIAE

STATEMENT OF INTEREST

The Office and Professional Employees International Union, AFL-CIO, CLC, is an international labor organization representing white collar and other employees engaged in office, clerical, professional, semi-professional, technical, and administrative work. Collec-

tive bargaining agreements covering the wages, hours, and working conditions of these employees are negotiated and consummated in most, but not all, situations by local unions chartered by the International Union. OPEIU Local 39 was the petitioner before the National Labor Relations Board in the original representation proceeding that launched the controversy in *Malleable Iron Range Company* and the charging party in Case No. 30-CA-5206 which was later reviewed by the Court of Appeals.

The International Union, believing itself to be the major labor organization in the United States in engaged in representing office and professional employees, is virtually concerned with the single issue in this case, since a vast majority of its members, in their daily employment, have access to information that most employers would not want revealed to competitors, to regulatory agencies, and to the public in general. An affirmation of the ruling below would result in the virtual destruction of the International Union as a meaningful entity in the representation of such employees.

There is likewise a broad concern for the entire American work force engaged in office, clerical, professional, and semi-professional work. The Bureau of Labor Statistics has projected that, by 1990, the economy will have created nearly 20 million new jobs, well over half of which will be in white-collar occupations. In the white-collar category, clerical employees, which include bank tellers, bookkeepers, cashiers, secretaries, and typists, are the fastest growing group. U.S. Department of Labor Statistics, News Bulletin 79 - 903 (Dec. 27, 1979). They will join millions of other similar employees who are not presently represented for the purposes of collective bargaining. Since most of their

work would, in one form or another, allow them access to information that an employer would consider confidential, they would be removed from coverage of the National Labor Relations Act.

Consent in writing to the filing of this brief amicus curiae has been obtained from the other parties involved, and such written consents are being filed with this brief in the Clerk's office.

The Office and Professional Employees International Union, as amicus curiae, supports the position of the National Labor Relations Board in this Court, and urges that the rulings below be reversed.

Statements of facts are omitted, since they will be contained in the Board's brief.

ARGUMENT

I. Historic Congressional And Judicial Considerations Have Been At All Times To Keep Management Personnel And Non-Management Employees Separate For Collective Bargaining Purposes

When one begins at the very essentials of the collective bargaining process, the initial inquiry, of necessity, must be who is to be bargained for. As is well known, Congress, in passing the Wagner Act, defined the term "employee" broadly, with but a few specified exceptions such as agricultural laborers, those in domestic service, and individuals employed by parent or spouse. 49 Stat. 449, Sec. 2 (3).

The task of determining who would be covered or included within bargaining units was reposed in, and carried out by, the Board. These observations preface the Board's decisional process, where its early rulings

recognized but one particular area for the exclusion of employees who were alleged to be "confidential." In *Brooklyn Daily Eagle,* 13 NLRB 974 (1939), it excluded personal secretaries to managers who handled union negotiations and grievances. In *Hoover Co.,* 55 NLRB 1321, at 1323 (1944), it set forth a rationale that has been at the core of its "confidentiale" policy from that time to this day:

> . . . management should not be required to handle labor relations matters through employees who are represented by the union with which the [employer] is required to deal and who in the normal performance of their duties may obtain advance information of the [employer's] position with regard to contract negotiations, the disposition of grievances, or other labor relations matters.

There was never any other, insofar as alleged confidential employees were concerned. There was no case law, or even decisional reference, as far as we know, that would lead any student of labor-management relations to think otherwise.

The touchstone of Wagner Act coverage, just as under the 1947 amendments that produced the current Act, has been in its definitions. In defining the term, "employer," the Wagner Act Congress made certain exclusions, which implied coverage to all not excluded, and likewise with its term, "employee," it was not seriously disputed that all who were not specifically excluded were to be embraced within the statute's protections.

It was never considered that those persons in the normal performance of their duties who may obtain advance information of the employer's position with regard to contract negotiations, and related labor matters, were not employees. The only issue before the Board in the

earlier cases, such as *Brooklyn Daily Eagle* and *Hoover Co., supra,* was whether they should be included in the same bargaining unit with other employees. The Board, for the reasons stated, concluded that they should not, leaving aside any question of what unit or units they might be allowed to participate in, or even whether they would be entitled to some unit of their own.

The foregoing discussion may appear to be elementary, but it seems a necessary perspective from which to approach the important area of legislative history so frequently relied upon in cases of the kind before us.

As this Court has repeatedly documented, the primary public, judicial, and Congressional dispute over the status of employees prior to the 1947 amendments concerned foremen. This Court's discussion in *NLRB* v. *Bell Aerospace Company,* 416 U.S. 267 (1974), the holding that spawned the decision below in these cases, adequately illuminates this controversy. After shifting its ground on the status of both foremen and managerial personnel, the Board ruled that foremen as statutory "employees" could constitute an appropriate unit for bargaining with their employers in *Packard Motor Co.,* 61 NLRB 4, 64 NLRB 1212 (1945). This holding led to this Court's decision affirming the Board in *Packard Co.* v. *Labor Board,* 330 U.S. 485 (1947), where the famed dissent of Mr. Justice Douglas became an articulate catalyst in the 1947 amending process.

These histories are too well-known to bear extensive and detailed repetition. The ultimate, undisputed point is that Congress in 1947 specifically amended the definition of "employee" to exclude those who were classed as supervisors. The only addition to the exclusionary language was that of "independent contractor," along with individuals employed by employers under the

Railway Labor Act, who were undoubtedly previously excluded under the Wagner Act because of the employer definition that exempted Railway Labor Act employers. Because independent contractors are primarily self-employed, it is safe to say that the *only* specific statutory exclusion from among employees was the supervisor.

As this Court so readily recognized in *Bell Aerospace,* this limited exclusion did not settle all controversies over the initial inquiry that began with the passage of the Wagner Act, i.e., who was to be bargained for. But focusing on the clash of competing ideas in the supervisor controversy should afford great guidance as to what Congress intended when it undertook its major overhaul of the Act in 1947. This Court's opinion in *Bell Aerospace* well captured the essence of the conflicting viewpoints, particularly as it emphasized the importance of Mr. Justice Douglas' dissent in the *Packard* case.

The real struggle was over who should be on the side of management and who should be on the side of labor. This is hardly ideological or philosophical, but rather intensely practical. While both judicial and Congressional analyses spoke in philosophical terms, the end result was, as always, addressed as to what persons should be sitting on which side of the table. Mr. Justice Douglas even used the term, "separate factions in warring camps," to illustrate his point that vice-presidents of companies, who were also employees, ought not be organized into unions.

Indisputably, these are judgments for Congress to make. A judgment was made in 1947, and this Court, as we study its decisions over the years, has faithfully endeavored to determine what Congress meant and apply it, as it did in *Bell Aerospace*. In that case, there was but

a single question before this Court, and no other. It was "whether all 'managerial employees,' rather than just those in positions susceptible to conflicts of interest in labor relations, are excluded from the protections of the Act." 416 U.S. at 274.

The problem confronting this Court in *Bell Aerospace* in dealing with managerials who might not fit the statutory definition of supervisor was to determine the intent of Congress as to whether these kinds of persons who were also "employees" of their employer should be excluded from statutory coverage. If they were also supervisors, of course, no problem would exist, since supervisors were excluded by definition from statutory coverage.

While it should be self-evident, whether there is statutory coverage or not is a far different issue than whether a particular employee should be in a particular bargaining unit, as was the question before the Labor Board in its earlier "confidential" cases, such as *Brooklyn Daily Eagle* and *Hoover Co.*

This Court's holding in *Bell Aerospace,* as we all know, was that managerials were not entitled to statutory coverage at all. Later, in *NLRB* v. *Yeshiva University,* _____ U.S. _____ (1980), at it termed its *Bell* ruling as "the *judicially implied exclusion* for 'managerial employees' *who are involved in developing and enforcing employer policy.*" (Emphasis supplied).

This explanation in *Yeshiva University,* we believe, is extremely important in illuminating the central core issue in the instant cases.

It may appear presumptious indeed to attempt to tell this Court what its holding was in so recent a case as *Bell Aerospace,* and we seek to forgo even the ap-

pearance of doing so. But an argument in our cases here can hardly be made without constant reference to *Bell,* since the Court of Appeals below relied on it, and nothing else.

Therefore, it would appear that the "judicially implied exclusion" of managerials from statutory coverage, as we seek to understand *Bell Aerospace,* would come from their status as "being in the nature of supervisors," or as "those whose interests are as closely aligned with those of management as those of supervisors, who must direct the work force." As this Court further explained in *Yeshiva University, supra,* managerial employees are defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer. . . . These employees are 'much higher in the managerial structure' than those explicitly mentioned by Congress, which 'regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary.' " _____ U.S. _____, at _____.

This brings us to the status of "confidential" employees and what we believe was a major misperception of the court below in interpreting this Court's holding on managerials.

The secretary who was fired in such "lamentable injustice", as Judge Cudahy termed it below, in *Hendricks County Rural Electric Membership Corporation* is unquestionably an employee under anyone's statutory definition. The 18 office clericals sought to be excluded as confidential by *Malleable Iron Range Company* are employees as well, since no one would contend they are supervisory and neither could it be argued that they are managerials "who formulate and effectuate management

policies by expressing and making operative the decisions of their employer."

The proposition which respondents will be compelled to argue, it would appear, to support the Seventh Circuit's decision is that the intent of Congress, as interpreted by this Court in *Bell Aerospace,* was to enroll these employees on the side of management as against the interests of other employees to such a degree that they would take on the similar *status* of supervisors, and thus be termed "non-employees" as are managerials.

Such a proposition simply cannot be sustained.

The Seventh Circuit relied almost entirely on this Court's footnote 12 in *Bell Aerospace* in its *Hendricks County* decision. And, after having concluded that *all* (emphasis by court below, 31a) secretaries working in a confidential capacity must be *excluded* (emphasis supplied) from the Act, it was the next logical step in *Malleable* to conclude that all other employees, no matter what job they may hold, as long as they have access to information the employer considers confidential, must likewise be totally excluded from coverage of the Act, presumably as "non-employees." (We would suspect that nearly all of the 55 employees who voted in the election would have some access to information considered by Malleable to be confidential, rather than the 18 identified. We further suspect that Malleable proceeded with some degree of timidity in this area, surely not recognizing the full consequences of the scope of what it was seeking to accomplish.)

Prior to the 1947 amendments, there was never any public or judicial controversy, as far as we can learn, about whether employees who had access to information considered confidential by their employers were on the

side of management or on the side of labor, in contrast to the spirited controversy over the status of supervisors.

This Court's discussion of the 1947 legislative history that preceded note 12 (which we shall not attempt to repeat here, since we expect the history to be more fully developed in the Board's argument), noted that the original House version of the bill wanted to make exclusions of certain persons defined as supervisors explicit. In that original bill, there was specific language that may well have accomplished what the court below accomplished in its ruling: it would have excluded individuals who are given "by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally."

Such explicit language, however, was never enacted into law, having been removed in conference. This Court, in discussing the unfolding history, in the sentences that produced note 12, said:

> The legislative history strongly suggests that there also were other employees, much higher in the managerial structure, who were likewise regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary. For example, in its discussion of confidential employees, the House Report noted that "[M]ost of the people who would qualify as 'confidential employees' are *executives and are excluded from the Act in any event.*" [Italics by this Court.] H. R. Rep. No. 245, at 23.

In note 12, this Court repeated the "Most of the people" quotation from the House Report, once again italicizing the language. It added further words from the House Report that indicated the House belief that the Board itself "normally excludes from bargaining units

confidential clerks and secretaries to people such as these."

The "such as these" were surely the executives referred to previously. At this point, we must note that the House was talking in terms of *exclusion from statutory coverage* of those executives considered confidential while it mentioned only that the Board "normally excludes" from bargaining units clerks and secretaries to people "such as these." Again, there is the difference between statutory coverage and inclusion or exclusion from bargaining units, two very separate and distinct matters.

This Court, in continuing its commentary in note 12, pointed out that the discussion concerning "confidentials" went farther than those involved in labor relations. This brings us once again to "executives," whom the House thought would be excluded from the Act in any event. This Court then said, "Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover 'confidential employees' even under a broad definition of that term."

But whatever Congress may have thought, any reference to exclusion of confidentials was still focused on "executives," since they were the ones considered by Congress to be given information that was of a confidential nature. This follows from their role in "running the business," or in "formulating and effectuating management policies by expressing and making operative the decisions of their employers." To perform these functions, it would be almost impossible to deny them access to information that would not be available to the public, to competitors, and to employees generally.

This, of course, is consonant with the House's statement that the Board normally excluded from bargaining units confidential clerks and secretaries to "people such as these."

Thus, the legislative history, while showing the intent to exclude managerials that this Court found in *Bell Aerospace,* does not show, even in any strained interpretation, that Congress ever considered that secretaries and clerks were "non-employees." It knew they were excluded from bargaining units by the Board in some instances, but, as we have pointed out, this is a far different matter than statutory exclusion as such.

The consequences of exclusion of a vast army of America's work force from statutory coverage would have been nearly incomprehensible. Judge Cudahy, in his dissent below, perceptively pointed out that, "Many, *if not most,* (emphasis by Judge Cudahy) white collar workers are involved in something which may be argued to be 'confidential' in some general sense. There are matters of credit, of costs, of designs, of customer lists, of prices, of medical records — the list is endless. I do not perceive at all that the dicta of Bell Aerospace points down this road."

It would be difficult indeed to argue rationally that Congress knowingly and deliberately, in these words in its reports on a subject matter that is still embedded with legal complexities, intended to remove from statutory coverage every clerical worker in America who had access to information his employer considered confidential. Any fair reading of its reports, it seems, points indisputably to the conclusion that the "access" persons it was concerned about were executives, not rank and file office workers.

This returns us full circle to the Congressional rationale for the placement of supervisors and "managerials" beyond the statutory protection of the Act. One does not need to indulge in class terminology of "warring camps" to recognize that the interests of those who manage the business and those who labor in it are vastly different. Congress showed its displeasure with the concept of unionization of foremen by defining supervisors and making them "non-employees." This Court has found a "judicially implied exclusion" from the statute's coverage for those who formulate and effectuate management's policies, for they, too, are even more involved in managing the enterprise than the front line supervisor on the shop floor or in the office.

Contrariwise, secretaries and clerks and draftsmen and salesmen who may have access to innumerable portions of information their employers would not want to be made public are not engaged in directing work forces or managing the enterprise. They ordinarily have not committed themselves to pursue careers in managerial hierarchies, unless they are promoted to that level. There is simply no reason to hold that they are not statutory employees under the Act.

This is why the Board's "labor nexus" test has proved such a sound, workable solution to the issue of whether certain clericals should be included within collective bargaining units. It has excluded those who have access to confidential information in the labor relations area, not because they are not employees, which they are, but because their participation in collective bargaining would interfere with the Congressional effort to keep those who are aligned with management and those who are not as separate entities in the collective bargaining process. The rationale of *Hoover Co.* has stood the test

of some 37 years of experience with it thereafter. It was never judicially questioned in any serious manner until the surprising rulings of the court below.

Most assuredly, the Seventh Circuit's clinging reliance on note 12 in *Bell Aerospace* did not take into account the consequences of what its decision might bring, despite the stern warning in the dissent of Judge Cudahy. To consider true confidentiality of information and records, one need only look to the health care industry. Medical patients repose in confidence that their records will not be made known to the public and to unauthorized persons of every walk of life. Yet, Congress amended the Labor Act in 1974 to extend statutory coverage to employees throughout the health care industry, with special provisions pertaining thereto.

It cannot be disputed that records clerks and secretaries and technicians by the scores have access to confidential medical records of patients in health care institutions as a regular part of their daily duties. Yet, the implications of the decisions below would be to deprive a vast number of employees of health care institutions of statutory protection because they have access to records of confidentiality only a few short years after the Congress, surely aware of the confidential nature of their work, amended the statute to extend coverage to them. Such a paradoxical result was never intended.

Similar difficulties would surely arise with professional employees. Congress carefully defined the term, "professional employee," in §2(12) of the Act and provided protection for their interests from being included in bargaining units with non-professionals against their wishes. As a practical matter, it would be difficult to conceive that a research chemist in a laboratory, or a design engineer, or even a staff lawyer would not have

access to data that an employer would not want made known to the public or to competitors or to any unauthorized person. It may be said to be endemic in the nature of their work, for professional performance is surely of a level that involves judgments dealing with front rank company information of a vital kind. Yet, to exclude as a non-employee any individual having access to data that an employer would not want made generally known would surely eliminate most professional employees from statutory coverage, even though Congress specifically included them within the law.

The true concern of Congress was with division of interests. The entire scope and breadth of Congressional history and statutory enactment was to place on the side of management all those whose interests were truly aligned with management, and to authorize collective bargaining for all those whose interests were not truly aligned with management. The secretary or office clerk, because they perchance through their regular daily work had access to confidential business information, were never considered to be among those whose interests were truly aligned with managerial personnel. They are within the statutory definition of "employee," pure and simple, and there is no warrant whatever for interpreting the statute otherwise.

II. Breaches Of Confidentiality, If Any, By Employees Can Be Remedied Through Discipline, Not Deprivation Of Statutory Rights

While the foregoing discussion, if correct, which we believe it to be, is sufficient to resolve the question of whether employees who may have access to confidential business data are covered within the statutory definition of "employee," it is submitted that even the controversy

itself, and the frequent raising of it by employers is literally much ado about nothing.

Any employee who may breach his employer's rules against divulging of confidential business data may be properly disciplined. This is irrespective of membership in a lab or organization, which is a subject matter separate and apart from handling of data of confidentiality. An employer might argue that it would be more difficult to impose discipline under a union contract, but that, of course, presupposes that due process under a "just cause" provision in a labor agreement is a bad thing. Surely, any knowledgeable and sophisticated employer well knows that proof of wrong doing, such as violation of a rule against disclosure of business data, will sustain disciplinary action properly imposed, no matter what any union contract of which we are aware would hold. The desire to protect business secrets is totally unrelated to collective bargaining, a monstrous *non sequitur*.

The Board, of course, has dealt adequately with this issue in its decisions over the years. It has surfaced repeatedly, but never with more acuity than in two *Dun & Bradstreet* cases. Dun & Bradstreet, whose well known credit reporting is subject to its own strict rules of confidentiality has argued repeatedly for the denial of collective bargaining for its employees who gather financial data. In *Dun & Bradstreet, Inc.*, 194 NLRB 9 (1971), the Board stated: "The law has clearly rejected the notion that membership in a labor organization is in itself incompatible with the obligations of fidelity owed to an employer by its employees."

In *Dun & Bradstreet, Inc.*, 240 NLRB No. 16 (1979), the employer sought reconsideration of the Board's ruling, and offered evidence even that unioniza-

tion would have an adverse impact upon its business because of customer reluctance to provide data to unionized credit reporters. While one may personally reject such speculative fear as another ludicrous example of political-type hyperbole, the Board found no real evidence to that effect, even though it was deemed irrelevant to statutory protection. But the Board, willing to assume, *ad arguendo,* that there might be unwarranted disclosure, aptly remarked in its note 7 that ". . . there is no reason to suppose that the Employer would be any less able to remedy employee breaches of confidentiality by disciplining offending employees merely because its employees were represented by a union."

Thus, the only policy rationale for excluding non-supervisors and non-managerials from bargaining units is that adopted by the Board, access to labor relations data. One might inquire whether breaches of confidentiality here could be adequately remedied by discipline also, but the unit determination has long ago been made by the Board, and no one today even disputes it as sound doctrine.

CONCLUSION

In dealing with the status of secretaries and clerks and white collar personnel who may have access to information an employer might consider confidential in a business sense, it must be recognized that these employees fall within the statutory definition of "employees," and are thus protected by the Act. To argue that Congress intended that they not be statutory employees is to stand upon virtually nothing, since there is no probative history of an affirmative Congressional intent to that effect. For all these reasons, the rulings of the court below should be reversed and the position of the Board upheld in all respects.

Respectfully submitted

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD,
PETITIONER
V.
HENDRICKS COUNTY RURAL ELECTRIC
MEMBERSHIP CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE, LEGAL FOUNDATION OF AMERICA, URGING AFFIRMANCE

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No. 80-885
No. 80-1103

NATIONAL LABOR RELATIONS BOARD,

Petitioner

V.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION,

Respondent

On writ of certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE, LEGAL FOUNDATION OF AMERICA

CONSENT OF PARTIES

All parties have consented to the filing of this brief of amicus curiae. Letters of consent have been lodged with the Court.

INTEREST OF AMICUS CURIAE

Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm.

Its goals (among others) include limited government, protection of the free enterprise system, and the removal of unreasonable regulation. All litigation undertaken by LFA is approved by its Board of Trustees. LFA does not accept private fees, and the bulk of its work is done by professors of law.

In this case, LFA would urge this Supreme Court to affirm the judgment of the Court of Appeals, holding that personal secretaries of managers are "confidential employees" excluded from the coverage of the National Labor Relations Act. To hold otherwise could conceivably mean that confidential personal secretaries could collectively bargain with their managers concerning the details of this most intimate of working relationships. Even if the consequences were confined to "mutual aid and protection," a contrary holding would mean that one could not trust one's personal secretary with any sort of private

information for fear that it might be used with impunity in protected concerted activities.

STATEMENT OF THE CASE

Mary Weatherman was the personal secretary of the general manager of Hendricks County Rural Electric Membership Corporation, Wallace Dillon. Dillon discharged her a few days after she signed a petition supporting an employee who had been denied reinstatement by the Board of Directors of the Corporation. Although the reason for the discharge was a matter of dispute at trial, the administrative law judge concluded that it was motivated by Weatherman's signing of the petition. This fact finding, in turn, led to a holding by the NLRB that the Corporation was guilty of an unfair labor practice, in that it had discharged Weatherman for engaging in concerted mutual-aid-and-protection activity. The NLRB concluded that Weatherman was not a "confiden-

tial employee" excluded from coverage of the National Labor Relations Act, because although she was a personal secretary and entrusted with confidential information, she did not deal with confidential labor relations matters.

The Court of Appeals denied enforcement of the Board's order. It held, contrary to the Board, that confidential employees were excluded from the coverage of the Act irrespective of the presence or absence of any "labor nexus." Thus even if Dillon did perceive Weatherman's conduct as an act of disloyalty and discharge her for it, the discharge was not unlawful because, under the Court of Appeals holding, he was entitled to do so. This Court granted certiorari to consider this question.

In a companion case, NLRB v. Malleable Iron Range Company, the employer claimed that 18 of approximately 64 employees were "confidential." The employees ranged from

a "production process coordinator," who managed much of the company's production, to a person the NLRB claims is "essentially a shipping clerk." The NLRB, however, did not distinguish those closely allied with management; rather, it indiscriminately decided that since none of the employees were entrusted with confidential labor information all were covered. The Court of Appeals reversed. Without deciding whether any of such employees were covered, the Court directed the NLRB to reconsider each on a case-by-case basis. Thus Malleable did not result in exclusion of anyone from the Act, but simply required the Board to reconsider each of the employees under the test enunciated in Hendricks.

SUMMARY OF THE ARGUMENT

I.

The decision of the Board was based upon the Board's own B.F. Goodrich standard,

which requires a "labor nexus" for an employee to be excluded as "confidential." The Court of Appeals, however, correctly concluded that this Court's decision in NLRB v. Bell Aerospace Corp. overruled that standard.

II.

The legislative history and the policy underlying the exception indicate that confidential employees should be excluded from the coverage of the Act without respect to labor nexus.

III.

A. The exclusion of confidential employees without regard to labor nexus is consistent with the need for some degree of business associational privacy, a requirement to be found in constitutional doctrine as well as legislative policy.

B. A personal secretary presents particularly strong business privacy reasons for exception from the coverage of the

act, in that (1) there is greater need than with the rank-and-file for personalized control over the secretary's manner of execution of the job; (2) the secretary's handling of confidential information should not be the subject of labor negotiations; (3) there is need for informal and frank communication with one's secretary without fear that such communication will be used in "mutual aid" activities; and (4) the close working relationship between secretary and manager requires an ability to terminate the relationship for personal reasons, without fear of concerted reprisal or grievances.

ARGUMENT AND AUTHORITIES

I. IN NLRB V. BELL AEROSPACE CO., THIS COURT OVERRULED THE BOARD'S B.F. GOODRICH STANDARD AND INDICATED THAT NO "LABOR NEXUS" WAS REQUIRED TO EXCLUDE "CONFIDENTIAL EMPLOYEES" FROM PROTECTION FOR LABOR ACTIVITIES.

In NLRB v. Bell Aerospace Co., 416 U.S. 267, 270-75 (1974), this Court rejected the Board's "labor nexus" definition of the "managerial employee" exception to the NLRA. Bell Aerospace was a clear overruling of the standard the Board set in B.F. Goodrich Co., 115 N.L.R.B. 722 (1956), in which the NLRB had restricted such exceptions to employees working with labor relations. Focusing on the historical and economic distinctions between "management" and "labor" and the relevant legislative materials accompanying the 1947 Taft-Hartley amendments, this Court held that "'managerial employees' are not covered by the Act. We agree with the Court of Appeals below that the Board 'is not now free' to read a a new and more restrictive meaning into the Act" by the adoption of tests such as "labor nexus." 416 U.S. at 289.

The "confidential employee" exception was not directly at issue in Bell Aerospace. However, the Court thoroughly canvassed the Congressional reports and made a number of pointed references to the parallels between managerial personnel and "confidential employees." It noted, for instance, that

> both the House Report and the Senate Report voiced concern over the Board's broad [pre-1947] reading of the term "employee" to include those clearly within the managerial hierarchy.

416 U.S. at 281; see also Packard Motor Car Co. v. NLRB, 330 U.S. 485, 494-95 (1947) (Douglas, J., dissenting) (basic policy of the NLRA is to create an adversarial struggle between the distinctly separate "camps" or "factions" of management and labor; "what is included in one group is excluded from the other").

The House Report relied upon in Bell Aerospace stated that "confidential employees"

> are people who receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally.

H.R. Rep. No. 245, 80th Cong., 1st Sess., 23 (1947). This passage obviously does not contemplate that only labor-related confidential information would qualify. It squarely contradicts such a "labor nexus." In Bell Aerospace, the Court was concerned directly with the exception for "managerial" employees, but it also spoke about "confidential" employees. It unquestionably interpreted the legislative history of the Taft-Hartley amendments as having excepted confidential clerks and secretaries, as well as managers, without regard to "labor nexus":

> The discussion of "confidential employees" in both the House and Conference Committee Reports... unmistakably refers to that term as defined in the House bill, which was not limited just to those in "labor relations." Thus,

> although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.

416 U.S. at 284 n. 12 (emphasis added). The Court treated "managerial" and "confidential" employees similarly throughout its opinion, insofar as rejection of a "labor nexus" requirement was concerned.

Despite the obvious import of this Court's careful reasoning and analysis, the NLRB has failed to follow the Bell Aerospace mandate, with the apparent acquiescence of several courts of appeals. It is imperative, in order to preserve the doctrinal integrity of Bell Aerospace and to implement the "clear" and "unmistakable" intent of Congress, that the B.F. Goodrich

standard be once again declared invalid.* Decisions contrary to that of the Court of Appeals in the case at bar, such as Union Oil Co. of California, Inc. v. NLRB, 607 F.2d 852 (9th Cir. 1979) and NLRB v. Allied Products Co., 548 F.2d 644 (6th Cir. 1977), are inconsistent with Bell Aerospace and should therefore be overruled. The decisions in NLRB v. Wheeling Electric Co., 444 F.2d 783, 78488 (4th Cir. 1971) and Peerless of America, Inc. v. NLRB, 484 F.2d 1108, 1112 (7th Cir. 1973), holding

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*In Flinkote Co., 217 N.L.R.B. 497, (1975), the Board rejected a contention that Bell Aerospace had expanded the Board's traditional test of confidential status. "The Court's comments were dicta, since the confidentiality issue was not before it." Id. Thus, the Board adheres to its traditional definition of confidential employees and excludes as confidential only those individuals who assist and act in a confidential capacity to persons who formulate, determine, and, effectuate management policies with respect to labor relations. See Ford Motor Co., 66 N.L.R.B. 1317 (1946); Pullman Standard Division, 214 N.L.R.B. 762 (1974).

that confidential secretaries to management officials are excluded from the coverage of the NLRA, represent the better reasoned view and the only position consisent with this Court's construction of the 1947 amendments in Bell Aerospace.

II. THE POLICY FRAMEWORK OF THE NATIONAL LABOR RELATIONS ACT SUPPORTS THE SEVENTH CIRCUIT'S INTERPRETATION OF THE "CONFIDENTIAL EMPLOYEE" EXCEPTION AS NOT HAVING A "LABOR NEXUS" REQUIREMENT.

Mr. Justice Douglas' dissenting opinion in Packard Motor Car Co. v. NLRB, supra, has been described by this Court as "especially pertinent" in view of the subsequent legislative reversal of Packard. That dissent set forth with succinct clarity the fundamental purpose of the NLRA: to mobilize and regulate the economic struggle between the rank and file workers (known generally as "labor") and the salaried representatives of management. 330 U.S. at 494-95. Congress, in the 1947

Taft-Hartley amendments, clearly sought to effectuate Mr. Justice Douglas' dissenting arguments by excluding from the NLRA's coverage persons who were within the management hierarchy or closely allied with it.

A confidential secretary to a manager or supervisor, because of the employer's critical need for loyalty,* is surely "allied with" members of the management hierarchy, an individual whose sympathies and allegiances are owed to "the boss." Cf. NLRB v. Bell Aerospace Co. 416 U.S. at 282. A confidential employee's commitment to and alignment with management goals does not turn on the content of the information with which he or she is entrusted. Section 2(12)(c) of the bill, H.R. 3020, 80th Cong., 1st Sess. (1947) provided for the exclusion from the Act of

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*See NLRB v. Bell Aerospace Co., 416 U.S. at 281.

> any individual... who by the nature of his duties is given by the employer information that is of an confidential nature, and this is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.

The distinction drawn by the Board in B.F. Goodrich between confidential employees with a "labor nexus" and confidential employees with no such nexus, blurs the proper distinction, which is between management and labor interests. Cf. NLRB v. Bell Aerospace Co., 416 U.S. at 281. Mr. Justice Powell made this exact point to counter the dissenting opinion in Bell Aerospace:

> Extension of the Act to cover true "management employees" [as Congress believed confidential employees were] would indeed be revolutionary, for it would eviscerate the traditional distinction between labor and management.

Id. at 285 n. 13. See Retail Clerks International Ass'n v. NLRB, 366 F.2d 642, 645

(D.C. Cir. 1966), cert. denied, 386 U.S. 1017 (1967)("Congress intended to exclude from the protection of the Act those who comprised a part of 'management' or were allied with it. . .") (emphasis added); NLRB v. Wheeling Electric Co., 444 F.2d 783, 786 (4th Cir. 1971).

Furthermore, the same policy considerations that exclude supervisors, domestic workers, and family members from NLRA coverage, see 29 U.S.C. §152(3), and led Congress to prescribe separate bargaining units for regular employees and security guards who "enforce against employees and other persons rules to protect property of the employer," see U.S.C. §159(b)(3), support exclusion of all "confidential" employees from NLRA coverage. These groups are separated from the rank-and-file of labor because of the great potential for divided loyalties that might otherwise destroy management's "core of

entrepreneurial control," cf. International Union, UAW v. NLRB, 470 F.2d 422, 425 (D.C. Cir. 1972)(per Mr. Justice Clark, retired). Judge Craven, discussing the relationship of a confidential secretary to a management official, has perhaps articulated the policy implications most cogently:

> It strikes us as nonsense for the Board to exclude [a confidential employee] from membership in the bargaining unit and then extend to her the same protection for the same concerted activity that she would have enjoyed if a union member. If [a confidential employee] is committed to the union cause to the extent she joins the strike by refusing to cross the picket line, it would seem to matter little to the company that she is not technically a union member. A confidential secretary who plights her troth with the union differs in form, but not in substance, from one who holds a union card . . . . Management is entitled to security of its confidential information and may insist upon the loyalty of those employees who have access to it. For this reason, confidential employees cannot be granted the protection afforded ordinary

> employees under the Act. Like supervisors, "such loyalty cannot be secured if [they] are psychologically allied with, or subject to the pressures of their union on behalf of, the rank and file."

NLRB v. Wheeling Electric Co., 444 F.2d 783, 788 (4th Cir. 1971), quoting Cox, The Labor-Management Relations Act, 61 Harv. L. Rev. 1,5 (1947). Wheeling Electric is virtually indistinguishable from the instant case and is, amicus for respondent submits, the correct resolution of the issue.

The argument of the NLRB against the general exclusion of confidential employees is, essentially, that all workers are "confidential" to some degree. Thus the NLRB argues that most white-collar workers have some access to credit, cost, design, customer, price or medical information; that teachers are required to keep examinations confidential; that newspaper reporters are required to keep "scoops" confidential; and

that even assembly line workers must know about manufacturing processes. From this, the NLRB concludes that the Court of Appeals' interpretation of the "confidential employee" exception would have a "staggering" and "drastic" effect on coverage of the Act. NLRB brief at 38-39.

The argument is sheer nonsense. It proceeds from the NLRB's unwillingness to concede that reasonable limits can be placed upon the confidentiality exception. Any principle, in the hands of an advocate hostile to it, can be reduced to absurdity by extension in this manner. So it is, for example, with the NLRB's own proposed test, that of labor nexus. In this area, the NLRB has been entirely willing to place reasonable limits on its test; it has required a "substantial" labor nexus. If it did not do so, the same "drastic" effect would result from the NLRB's own reasoning, because, to paraphrase the

NLRB's argument, "most employees have an arguably [labor-nexus] relationship with management" to some degree. NLRB brief at 39. The NLRB is willing, in other words, to test "labor nexus" by its substantiality, but it is not willing to test whether an employee is "confidential" by considering whether the proper handling of confidential managerial information is a "substantial" part of the employee's job.

If sensibly interpreted, the exclusion would thus not make an assembly line worker "confidential" merely because he is exposed to the manufacturing process, because no one would regard the keeping of confidences entrusted him by management as a "substantial" part of his job. Nor would a teacher become confidential merely because he has access to examination questions. But when someone, such as a secretary to a manager, is entrusted with the confidences of management

and the daily performance of her job depends in substantial measure upon keeping of those confidences, she becomes allied with "management" within the meaning of the Act and should be regarded as "confidential," whether the information is labor-related or not. The line thus drawn is no more difficult to administer than that proposed by the NLRB. Furthermore, this approach, unlike the NLRB's, is consistent with Bell Aerospace and with the intent of Congress.

III. THE NEED FOR RECOGNITION OF ASSOCIATIONAL PRIVACY IN THE BUSINESS CONTEXT SUPPORTS AFFIRMANCE.

A. The constitutional doctrine of associational privacy, as well as the legislative history of the Act, support the recognition of a doctrine of associational privacy in the business context.

Finally, amicus for respondent contends that the decisions of the Seventh Circuit must be affirmed in order to preserve a vital sphere of "business privacy" for

management officials. Executives and managers are dependent upon the support services of various clerical, secretarial, and administrative assistants. Were the broad protections of both "organized" and "unorganized" concerted activities* extended to this group of confidential employees, whose intimate knowledge of management data is a necessary prerequisite to their function of implementing management decisions, businessmen would be unable to rely on the loyalty of functionaries who are absolutely crucial to the operation of modern commercial enterprises.

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*Unorganized employees possess broad rights of "mutual aid or protection" under the Act. See, e.g., Note, Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act, 58 Texas L. Rev. 991 (1980). Needless to say, the application of this doctrine would pose as great an intrusion into the sphere of management autonomy and perogative as would, say, permitting managerial employees to collectively bargain.

Managers, supervisors, and other persons in the management hierarchy must be able to discipline or dismiss employees whose position is "confidential" in the broad meaning of that term, when and if it becomes obvious that the employee's sympathies, allegiance, and loyalty are with "labor" rather than "management." To hold otherwise would "chill" management discretion and entrepreneurial judgment currently protected from NLRB and judicial scrutiny. It seems almost axiomatic that if confidential employees were permitted to engage in "protected concerted activities" and "mutual aid and protection," they would no longer be meaningful confidants. Additionally, it would be incongruous to strip management of its sphere of business privacy and entrepreneurial autonomy and deny it the right to control and discipline persons it employs in a confidential association when the concept of individual

privacy and autonomy is recognized in so many other contexts.

The penumbra of the Bill of Rights recognized in Griswold v. Connecticut, 381 U.S. 479 (1965) should protect management's right to confidential association, for extension of the NLRA to confidential employees would surely be a government intrusion into private relationships. Similarly, it is difficult to distinguish parents' privacy interest in sending their children to parochial school, Pierce v. Society of Sisters, 268 U.S. 510 (1925), and private schools' freedom from excessive regulations, Meyer v. Nebraska, 262 U.S. 390 (1923), from an employer's right to control and limit access to confidential business data.

Even more compelling is the analogy to cases such as NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), wherein this Court stated:

> [I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Id. at 460-61 (emphasis added). In Buckley v. Valeo, 424 U.S. 1 (1976), this Court noted that "[t]he right of association is a 'basic Constitutional freedom' that . . . like free speech, lies at the foundation heart of a free society." Id. at 25.

B. The business privacy interest as to a confidential personal secretary is substantial, and it exists irrespective of the presence or absence of a "labor nexus."

A personal secretary is different from the rank and file of labor for reasons wholly apart from the NLRB's "labor nexus" theory of confidentiality. The reasons relate to associational and business privacy. They include the greater need to control the manner of performance of the

job, the need for frank yet private conversation, the inappropriateness of bargaining about the terms and conditions of guarding confidential information whether labor-related or not, and the intimacy of the working relationship.

(1) The need to control the manner of performance free of bargaining over terms and conditions.

With a confidential personal secretary, a manager has a deeper interest in exercising personal preferences as to control of the exact manner of performance of the job than in most types of employment. Personal and individual tastes may not be important in the context of a secretarial pool used indiscriminately by all persons in an office or in the ordinary labor rank and file, but individual managers have widely differing methods of using personal secretaries. If a particular manager's method of keeping his telephone file,

writing corrections on drafts, or performing the countless other office functions that make up the personal secretary-manager relationship were subject to negotiation by representatives of a personal-secretary bargaining unit under the NLRA, or were even the subject of "mutual aid and protection" between informally allied personal secretaries pitted against their bosses, the result would be an intolerable loss of both efficiency and personal freedom.

(2) The inappropriateness of negotiation concerning the obligation of secrecy, whether labor-related or not.

Secondly, the exposure of the secretary to confidential information creates non-negotiable obligations on the part of the secretary and a corresponding need for greater freedom of control on the part of the manager. To use an extreme example, the right to discipline a CIA agent, freely and immediately, is more important than the

right similarly to discipline a government janitor. The reason does not depend upon "labor nexus." It simply reflects the fact that negotiation over office procedures for handling confidential information is not appropriate.

(3) Frank, personal communication without fear of its use in concerted activities.

Thirdly, there is a need for a privacy in personal communications between secretary and manager, arising from the frank and informal nature of communications between them. A manager should be able to use an earthy expression in the privacy of his office, comment adversely (but privately) upon a co-manager higher in the hierarchy, or even offhandedly and humorously disparage the company's product, without fear that his unguarded remarks may be read the next day in the company newspaper as a result of the exercise of "mutual aid and protection" by his confi-

dential secretary. Such a concern sharply distinguishes the personal secretary from the rank and file, whether the secretary has any "labor nexus" or not.

(4) The need for prerogative in choice of a personal secretary owing to the intimacy of the relationship.

Finally, the close personal working relationship of confidential secretary and manager requires an ability to remove and replace the secretary for reasons of pure personality conflict, even if such treatment would not be countenanced as to employees protected under the NLRA. A secretary and manager often see each other for more hours per day than husband and wife. The lack of prospects for the business equivalent of divorce in such a situation would make for business relations worse than a bad marriage. Bargaining by organized employees, or mutual aid and protection by loosely associated ones,

would make the manager fear a grievance or disruption in such a situation even if he could theoretically justify his actions under a bargaining agreement.

* * *

In the context of the instant case, the NLRB argues that Weatherman did not receive labor relations materials, because Dillon himself had little to do with labor relations and because such communications as Dillon received relating to labor relations were structured to bypass Weatherman. If the decision of the Court of Appeals is reversed, every manager will have to bypass his secretary not only with labor materials, but with materials of a confidential nature of whatever description. A rule allowing managers the ability to trust their personal secretaries would be far preferable. Furthermore, the NLRB's

argument does not answer the confidentiality concerns here expressed as to issues other than labor-related.

In the Malleable case, these policy concerns would apply in varying degrees to the employees in question. For example, the assistant to the manager of the distribution-product-service department who has responsibility for handling product difficulties, who deals on a daily basis with confidential credit, design, pricing, customer and product-defect data, and who in all probability must have a close personal relationship with the manager, would seem to present issues similar to those of a personal secretary. Others may not. In any event, the holding of the Court of Appeals, that the NLRB should make a determination for each employee based on a full factual record, in Malleable, is correct.

CONCLUSION

For all of the reasons adduced in this amicus curiae brief, the decisions of the Seventh Circuit in Hendricks I and Hendricks II should be affirmed.

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Washington, D.C.

_____, 1981 _____

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80-1103

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MALLEABLE IRON RANGE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE UAW AS AMICUS CURIAE

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the petitioner in this case.

INTEREST OF THE AFL-CIO AND THE ISSUE TO BE COVERED IN THE AFL-CIO'S BRIEF AMICUS CURIAE

The AFL-CIO is a federation of 101 national and international unions with a total membership of 13,500,000 working men and women. The resolution of the question presented in this case concerning the status of confidential employees under the National Labor Relations Act, as amended, will determine whether or not hundreds of thousands of individuals are permitted to exercise the right to make a free choice of a collective bargaining representative under the system established by Congress in that Act for making such a choice and with the protections that system provides. The Federation and its affiliates that represent employees under the NLRA therefore have a major interest in the outcome.

The attached brief *amicus curiae* develops in detail the law as of 1947 concerning the scope of the term "employee" (defined in § 2(3) of the Wagner Act) with regard to "supervisory" and "confidential" employees and traces the evolution of the proposals in Congress that lead to the exclusion from the Act of "supervisors" as defined in § 2(11) of the NLRA, as amended by the Taft-Hartley Act. That legislative history in our view demonstrates that Congress intended that exclusion to affect foremen and the higher ranks of management but not to deny the Act's protections to individuals who have access to "confidential" information or even to freeze the law as it stood at the time (which excluded individuals with access to confidential *labor relations* information from collective bargaining) into statutory form. Thus, we submit that while the holding of *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) regarding the status of managerial employees is sound, the dictum in that case concerning the status of confidential employees (*id.* at 283-284) cannot be squared with the statute or with the underlying Congressional intent and should not be followed here.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

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